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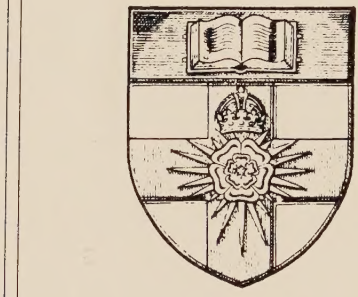

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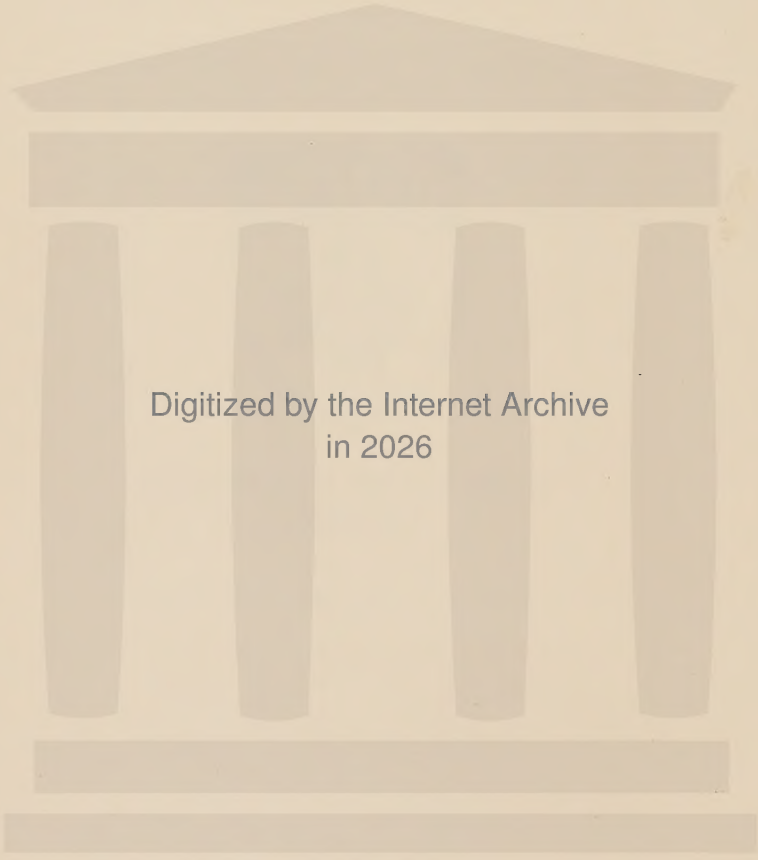

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MEMORANDA.

1922.

Feb. 6. Sir Ernest Murray Pollock, K.B.E., K.C., *was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council and took his seat at the Board accordingly.*

Mar. 8. The Right Hon. Sir Gordon Hewart, K.C., *His Majesty's Attorney-General, was appointed to the office of Lord Chief Justice of England in the place of the Right. Hon. Baron Trevethin, resigned. Sir Gordon Hewart was afterwards granted the dignity of a Baron of the United Kingdom, by the style and title of Baron Hewart of Bury, in the County of Lancaster.*

Mar. 9. The Right Hon. Sir Ernest Murray Pollock, K.B.E., K.C., *was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir Gordon Hewart, K.C.*

Mar. 9. Leslie Frederick Scott, Esq., K.C., *was appointed to be His Majesty's Solicitor-General in the place of the Right Hon. Sir Ernest Murray Pollock, K.B.E., K.C., and afterwards received the honour of Knighthood.*

May 12. The Hon. Sir Arthur Frederick Peterson, *one of the Justices of the Chancery Division of the High Court of Justice, died this day at his residence,* 39, *Cheyne Walk, Chelsea, aged* 62.

May 17. Mark Lemon Romer, Esq., K.C., *was appointed one of the Justices of His Majesty's High Court of Justice, Chancery Division, to fill the vacancy caused by the death of the Hon. Mr. Justice Peterson, and was afterwards knighted.*

Oct. 25. The Right Hon. Frederick Edwin Viscount Birkenhead, *having resigned his office, the Great Seal was delivered to the Right Hon. George Viscount Cave, G.C.M.G., whereupon the oath of office as Lord High Chancellor of Great Britain was administered to him.*

Oct. 27. Douglas McGarel Hogg, Esq., K.C., *was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir Ernest Murray Pollock, K.B.E., K.C., resigned. Mr. Hogg was afterwards sworn of His Majesty's Most Honourable Privy Council and took his place at the Board accordingly.*

Nov. 1. Thomas Walker Hobart Inskip, Esq., C.B.E., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Leslie Frederick Scott, K.C., resigned.*

Nov. 10. *A Baronetcy of the United Kingdom was conferred upon* The Right Hon. Sir Ernest Murray Pollock, K.B.E., K.C.

Nov. 28. Walker Baker Clode, Esq., K.C., *was appointed to be a permanent member and President of the Court styled the Railway Rates Tribunal, established by the Railways Act,* 1921.

Dec. 9. *The dignity of an Earldom of the United Kingdom was conferred upon* The Right Hon. Frederick Edwin Viscount Birkenhead *by the style and title of Earl of Birkenhead.*

Dec. 12. The Right Hon. Douglas McGarel Hogg, K.C., *His Majesty's Attorney-General, and* Thomas Walker Hobart Inskip, Esq., K.C., *His Majesty's Solicitor-General, received the honour of Knighthood.*

Dec. 18. John Wreford Budd, Esq., *a member of the Incorporated Council of Law Reporting for England and Wales, died at his residence,* 21 *Craven Hill Gardens, W., aged* 84.

ERRATA.

Page	*Line*	*For*	*Read*
		[1922] 1 A. C.	
88	1 (headnote)	" in the Province "	" outside the Province "
88	14 (of text)	" in British Columbia "	" outside British Columbia "
241	last but one	*Lloyd* v. *Groer, Smith & Co.*	*Lloyd* v. *Grace, Smith & Co.*
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Scottish Law Reporter	„	„	„	.	.	„	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Admiralty Commissioners *v.* S.S. Valeria – – – H. L. (E.)	242
Amalgamated Society of Carpenters, Cabinet Makers and Joiners *v.* Braithwaite H. L. (E.)	440
Aramayo Francke Mines *v.* Public Trustee – – H. L. (E.)	406
Ashley, General Union of Operative Carpenters and Joiners *v.* – – – – H. L. (E.)	440
Assessment Committee, Gleaner Co. *v.* – – – – P. C.	169
Atlantic Shipping and Trading Co. *v.* Dreyfus & Co. H. L. (E.)	250
Attorney-General *v.* Royal Mail Steam Packet Co. H. L. (E.)	279

B.

	PAGE
Bater, Great Western Ry. Co. *v.* H. L. (E.)	1
Braithwaite, Amalgamated Society of Carpenters, Cabinet Makers and Joiners *v.* H. L. (E.)	440

C.

Colliery (Wankie) Co. *v.* Inland Revenue Commissioners H. L. (E.)	51
Craine, Yorkshire Insurance Co. *v.* – – – – – P. C.	541
Curling, Matthey *v.* H. L. (E.)	180

D.

Dawsons *v.* Bonnin H. L. (Sc.)	413

PAGE

Dreyfus & Co., Atlantic Shipping and Trading Co. *v.* H. L. (E.) 250

G.

General Union of Operative Carpenters and Joiners *v.* Ashley – – – H. L. (E.) 440
Glasgow Corporation, Percy *v.* H. L. (Sc.) 299
Gleaner Co. *v.* Assessment Committee – – – – P. C. 169
Great Western Ry. Co. *v.* Bater H. L. (E.) 1

H.

Hamel and Horley, Ld., Hansson *v.* – – – – H. L. (E.) 36
Hansson *v.* Hamel and Horley, Ld. – – – H. L. (E.) 36
Hemmerde, Spencer *v.* H. L. (E.) 507

I.

Inland Revenue Commissioners, Wankie Colliery Co. *v.* H. L. (E.) 51
Insurance (Yorkshire) Co. *v.* Craine – – – – P. C. 541

L.

London and North Western Ry. Co. *v.* Neilson – H. L. (E.) 263

M.

Macedo *v.* Stroud – – P. C. 330
Manchester Liners *v.* Rea, Ld. H. L. (E.) 74
Matthey *v.* Curling – H. L. (E.) 180
Minister of Finance and Customs, Nova Scotia Steel and Coal Co. *v.* – – – P. C. 176
Montreal City *v.* Watt and Scott P. C. 555

N.

PAGE

Nat Bell Liquors, Rex *v.* P. C. 128
Neilson, London and North Western Ry. Co. H. L. (E.) 263
Nova Scotia Steel and Coal Co. *v.* Minister of Finance and Customs – – – P. C. 176

P.

Percy *v.* Glasgow Corporation H. L. (Sc.) 299
Poplar Assessment Committee *v.* Roberts – – H. L. (E.) 93
Portman *v.* Portman (Viscount) H. L. (E.) 472
Public Trustee, Aramayo Francke Mines *v.* – – H. L. (E.) 406

R.

Rea, Ld., Manchester Liners *v.* H. L. (E.) 74
Rex *v.* Nat Bell Liquors P. C. 128
—— Sisters of Charity of Rockingham *v.* – – – P. C. 315
Rhondda's (Viscountess) Claim H. L. (E.) 339
Roberts, Poplar Assessment Committee *v.* – H. L. (E.) 93
Royal Mail Steam Packet Co., Attorney-General *v.* H. L. (E.) 279

S.

Shipping and Trading (Atlantic) Co. *v.* Dreyfus & Co. H. L. (E.) 250
Sisters of Charity of Rockingham *v.* The King – – – P. C. 315
Spencer *v.* Hemmerde H. L. (E.) 507
Steam Packet (Royal Mail) Co., Attorney-General *v.* H. L. (E.) 279

PAGE

Steel and Coal (Nova Scotia) Co. *v.* Minister of Finance and Customs – – – P. C. 176
Stroud, Macedo *v.* – – P. C. 330

V.

Valeria (S.S.), Admiralty Commissioners *v.* – H. L. (E.) 242

W.

PAGE

Wankie Colliery Co. *v.* Inland Revenue Commissioners H. L. (E.) 51
Watt and Scott, Montreal City *v.* P. C. 555

Y.

Yorkshire Insurance Co. *v.* Craine – – – – P. C. 541

TABLE OF CASES CITED.

A.

		PAGE
A. M. C. Medicine Company *v.* City of Montreal	Q. R. 15 S. C. 594	557
Administrator-General of Bengal *v.* Prem Lal Mullick	L. R. 22 Ind. App. 107	341
Aitken *v.* Associated Carpenters and Joiners of Scotland	12 R. 1206	444
Altrincham Union Assessment Committee *v.* Cheshire Lines Committee	15 Q. B. D. 597	98
Anderson *v.* Fitzgerald	4 H. L. C. 484	416
Anning *v.* Anning	4 C. L. R. 1409	333
Argentino (The)	14 App. Cas. 519; 13 P. D. 191	242
Atkinson *v.* Richie	10 East, 530	234
Attorney-General *v.* De Keyser's Royal Hotel	[1920] A. C. 508	216, 283
——— *v.* Lancashire and Yorkshire Railway Company	2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95; 13 W. R. 8; 10 Jur. (N. S.) 705	2, 4
——— *v.* Ray	L. R. 9 Ch. 397	423
Attorney-General of Manitoba *v.* Manitoba Licence Holders' Association	[1902] A. C. 73	130
Attorney-General for Ontario *v.* Attorney-General for Dominion	[1896] A. C. 348	131
Attorney-General of Southern Nigeria *v.* Holt & Co.	[1915] A. C. 599	319
Auriol *v.* Mills	4 T. R. 94	223

B.

Baily *v.* De Crespigny	L. R. 4 Q. B. 180	180
Bank Line *v.* Capel & Co.	[1919] A. C. 435	210
Bank of Australasia *v.* Clan Line Steamers	[1916] 1 K. B. 39	250
Barker *v.* Edgar	[1898] A. C. 748	178
Bateman *v.* Pinder	3 Q. B. 574	521
Baxter's Leather Company *v.* Royal Mail Steam Packet Company	[1908] 2 K. B. 626	261
Bayley *v.* Manchester, Sheffield and Lincolnshire Railway Company	L. R. 7 C. P. 415	307
Baynton *v.* Morgan	21 Q. B. D. 101; 22 Q. B. D. 74	185
Beauchamp (Earl) *v.* Madresfield Overseers	L. R. 8 C. P. 245	347
Beckford *v.* Wade	17 Ves. 87	343
Belfour *v.* Weston	1 T. R. 310	235
Beresford-Hope, In re	[1917] 1 Ch. 287	477
——— *v.* Sandhurst	23 Q. B. D. 79	371
Berry *v.* Farrow	[1914] 1 K. B. 632	5

		PAGE
Bettini *v.* Gye	1 Q. B. D. 183	435
Biddell Brothers *v.* Horst Company	[1911] 1 K. B. 934	48
Blackpool Corporation *v.* Starr Estate Company	[1922] 1 A. C. 27	178
Bland *v.* Haselrig	2 Vent. 151	522
Blyth *v.* Birmingham Waterworks Company	11 Ex. 781	557
Bradford-on-Avon Assessment Committee *v.* White	[1898] 2 Q. B. 630	97
Brewster *v.* Kitchell	1 Salk. 198	221
Bristol Tramways, &c., Carriage Company *v.* Fiat Motors	[1910] 2 K. B. 831	86
Bristol's (Earl) Case	Lords' Journal 1625, vol. iii., p. 537	344
Brittain *v.* Kinnaird	1 Brod. & B. 432	152
Brooke *v.* The King	[1921] 2 K. B. 110	283
Brown *v.* Dunn	6 R. 67	553
——— *v.* Edgington	2 Man. & G. 279	77
——— *v.* Royal Insurance Company	1 E. & E. 853	239
Buccleuch (Duke) *v.* Metropolitan Board of Works	L. R. 5 H. L. 418	319
Buchanan *v.* Glasgow Corporation	7 F. 1001	303
Buckhurst Peerage	2 App. Cas. 1	357
Buckmaster *v.* Russell	10 C. B. (N. S.) 745	521
Bunbury *v.* Fuller	9 Ex. 111	158

C.

Caledonian Insurance Company *v.* Gilmour	[1893] A. C. 85	254
Canadian Pacific Railway Company *v.* Fréchette	[1915] A. C. 871	564
Canadian Pacific Wine Company *v.* Tuley	[1921] 2 A. C. 417	130
Cannon Brewery Company *v.* Gas Light and Coke Company	[1904] A. C. 331	54
Cap Palos (The)	[1921] P. 458	274
Carr *v.* Erroll	14 Ves. 478	475
Carter *v.* Cummins	Cited in 1 Cas. in Ch. 84	233
Castellain *v.* Preston	11 Q. B. D. 380	219
Chamberlain's Wharf *v.* Smith	[1900] 2 Ch. 605	444
Chanter *v.* Hopkins	4 M. & W. 399	87
Chasemore *v.* Turner	L. R. 10 Q. B. 500	510
Chesham (Lord), In re	31 Ch. D. 466	487
Chesham's (Lord) Settlement, In re	[1909] 2 Ch. 329	474
Chorlton *v.* Lings	L. R. 4 C. P. 374	341
Christie *v.* Gosling	L. R. 1 H. L. 279	474
City of Glasgow Union Railway Company *v.* Hunter	L. R. 2 H. L. Sc. 78	326
City of Peking (The)	15 App. Cas. 438	245
Colonial Bank of Australasia *v.* Willan	L. R. 5 P. C. 417	128
Connecticut Fire Insurance Company *v.* Kavanagh	[1892] A. C. 473	554
Cooper *v.* Kendall	[1909] 1 K. B. 405	507
Coutts *v.* MacBrayne	1910 S. C. 386	303
Cowper Essex *v.* Acton Local Board	14 App. Cas. 153	315
Cox, McEuen & Co. *v.* Malcolm & Co.	[1912] 2 K. B. 107n.	37

D.

		PAGE
Dahl *v.* Nelson, Donkin & Co.	6 App. Cas. 38	186
Dalgety & Co. *v.* Australian Mutual Provident Society	(1908) Vict. L. R. 481; 1 Stone's Insce. Cas. 177	416
De Keyser Hotel Case	[1920] A. C. 508	207
Dickson *v.* Thomson	2 Show. 126	530
Doe *v.* Knight	5 B. & C. 671	333
—— *v.* Meyler	2 M. & S. 276	232
Doleman & Sons *v.* Ossett Corporation	[1912] 3 K. B. 257	253
Dominion Natural Gas Company *v.* Collins	[1909] A. C. 640	560
Drummond *v.* Collins	[1915] A. C. 1011	54
—— *v.* Van Ingen	12 App. Cas. 284	84
Duckett, In re	[1918] 1 I. R. 110	477

E.

Edgington *v.* Fitzmaurice	29 Ch. D. 459	543
Edinburgh Street Tramways Company *v.* Torbain	3 App. Cas. 58	343
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	262
Ellison *v.* Ellison	6 Ves. 656	338
Emery and Barnett, In re	4 C. B. (N. S.) 423	212
English Crown Spelter Company *v.* Baker	5 Tax Cas. 327	170
Europa (The)	[1908] P. 84	255
Eyston *v.* Studd	1 Plowd. 203	369

F.

Farr *v.* Motor Traders Mutual Insurance Society	[1920] 3 K. B. 669	418
Faulkner *v.* Ottawa City	41 Can. S. C. R. 190	558
Feather *v.* The Queen	6 B. & S. 257	353
Fergusson *v.* Noble	7 Tax Cas. 176	6
Fettes *v.* Robertson	37 Times L. R. 581	507
Foley *v.* Burnell	1 Bro. C. C. 274; 4 Bro. P. C. 319	474
Ford *v.* Beech	11 Q. B. 852	254
Foster *v.* Great Western Railway Company	[1904] 2 K. B. 306	263
Fowler, In re	[1917] 2 Ch. 307	477
Frank Mills Mining Company, In re	23 Ch. D. 52	173
Freeman *v.* Cooke	2 Ex. 654	543
Frost *v.* Aylesbury Dairy Company	[1905] 1 K. B. 608	77

G.

Garnett *v.* Willan	5 B. & Al. 53	265
General Trading Company and Van Stolk's Commissie Landel, In re	16 Com. Cas. 95	41
George Whitechurch, Limited *v.* Cavanagh	[1902] A. C. 117	542
Gibaud *v.* Great Eastern Railway Company	[1921] 2 K. B. 426	273
Gillespie Brothers & Co. *v.* Cheney, Eggar & Co.	[1896] 2 Q. B. 59	74

		PAGE
Gittus *v.* Inland Revenue Commissioners	[1921] 2 A. C. 81	54
Goff *v.* Great Northern Railway Company	3 E. & E. 672	299
Gold Seal, Limited *v.* Dominion Express Company	15 Alb. L. R. 377; 16 Alb. L. R. 113; 62 Can. S. C. R. 424	130
Great Western and Metropolitan Railway Companies *v.* Kensington Assessment Committee	[1916] 1 A. C. 23	100
Great Western Railway Company of Canada *v.* Braid	1 Moo. P. C. (N. S.) 101	556
Green *v.* Humphreys	20 Ch. D. 474	510
Greenock Corporation *v.* Caledonian Railway Company	[1917] A. C. 556	563
Greta Holme (The)	[1897] A. C. 596	242
Gunyon *v.* South Eastern and Chatham Railway Company's Managing Committee	[1915] 2 K. B. 370	265

H.

Hambrough *v.* Mutual Life Insurance Company of New York	72 L. T. 140	418
Hamlyn & Co. *v.* Talisker Distillery	[1894] A. C. 202; 21 R. (H. L.) 21	253
Hammersmith Railway Company *v.* Brand	L. R. 4 H. L. 171	319
Hammond *v.* St. Pancras Vestry	L. R. 9 C. P. 316	557
——— *v.* Smith	33 Beav. 452	511
Harding *v.* Metropolitan Railway Company	L. R. 7 Ch. 154	180
Harrington *v.* Harrington	L. R. 3 Ch. 564; L. R. 5 H. L. 87	474, 499
Hart *v.* Prendergast	14 M. & W. 741	511
Harvey *v.* Sturgeon	1912 S. C. 974	303
Hawes *v.* Hart	18 Nov. Scot. R. 42	146
Hawkins *v.* Gathercole	6 D. M. & G. 1	347
Hawthorn (Mayor of) *v.* Kannuluik	22 Times L. R. 28	558
Hebbert *v.* Purchas	L. R. 3 P. C. 605	346
Hellings *v.* Shaw	7 Taunt. 608	529
Herron *v.* Rathmines and Rathgar Improvement Commissioners	[1892] A. C. 498	341
Heylin *v.* Hastings	Carth. 470	522
Heyling *v.* Hastings	1 Ld. Raym. 389	389
Hogg *v.* Jones	32 Beav. 45	475
Holborn Viaduct Land Company *v.* The Queen	2 Tax Cas. 228	54
Holditch *v.* Canadian Northern Ontario Railway Company	[1916] 1 A. C. 536	322
Hopkins *v.* Logan	5 M. & W. 241	523
Hopwood, Ex parte	15 Q. B. 121	152
Hornby *v.* Houlditch	Andr. 40; 1 T. R. 93, note (a)	223
Horton *v.* Colwyn Bay Urban Council	[1908] 1 K. B. 327	328
——— *v.* Sayer	4 H. & N. 643	254
Howard *v.* Miller	[1915] A. C. 318	333
Hurst *v.* Parker	1 B. & Al. 92	521
Hutchins *v.* London County Council	32 Times L. R. 179; 80 J. P. 193	303

I.

		PAGE
Initiative and Referendum Act, In re.	[1919] A. C. 935	131

J.

Jacobs *v.* Credit Lyonnais	12 Q. B. D. 589	234
——— *v.* Scott & Co.	36 S. L. R. 611	87
Johnson *v.* Taylor & Co.	[1920] A. C. 144	41
Jones *v.* Bright	5 Bing. 533	76
——— *v.* Just	L. R. 3 Q. B. 197	76
Joseph Thorley, Limited *v.* Orchis Steamship Company	[1907] 1 K. B. 660	255
Jureidini *v.* National British and Irish Millers Insurance Company	[1915] A. C. 499	254

K.

Kelly *v.* National Society of Operative Printers	113 L. T. 1055	445
Kish *v.* Taylor	[1912] A. C. 604	255

L.

Lacasse *v.* Fortier	30 Can. Crim. Cases, 87	146
Landauer & Co. *v.* Craven & Speeding Brothers	[1912] 2 K. B. 94	37
Lee *v.* Wilmot	L. R. 1 Ex. 364	510
Lewis, In re	[1918] 2 Ch. 308	477
Life Association of Scotland *v.* Foster	11 M. 351	417
Lilley *v.* Doubleday	7 Q. B. D. 510	273
Lincoln Corporation *v.* Holmes Common	L. R. 2 Q. B. 482	98
Linsell *v.* Bonsor	2 Bing. N. C. 241	533
Lloyd *v.* Grace, Smith & Co.	[1912] A. C. 716	303
——— *v.* Guibert	L. R. 1 Q. B. 115	234
——— *v.* Maund	2 T. R. 760	528
London and Northern Estates Company *v.* Schlesinger	[1916] 1 K. B. 20	185
London Assurance *v.* Mansel	11 Ch. D. 363	416
London County Council *v.* Erith Churchwardens	[1893] A. C. 562	96
Lovesy *v.* Stallard	30 L. T. 792	149
Low *v.* Bouverie	[1891] 3 Ch. 82	542
Lubbock *v.* British Bank of South America	[1892] 2 Ch. 198	170
Lundie *v.* MacBrayne	21 R. 1085	299
Lyon *v.* Fishmongers' Company	1 App. Cas. 662	319

M.

M'Cormack *v.* Glasgow Corporation	1910 S. C. 562	304
Macdonald *v.* Law Union Insurance Company	L. R. 9 Q. B. 328	416
M'Laren *v.* Miller	7 R. 867	461

		PAGE
McLuskey *v.* Cole	[1922] 1 Ch. 7	444
McNutt, In re	47 Can. S. C. R. 259	167
Madras Railway Company *v.* Zemindar of Carvatenagarum	L. R. 1 Ind. App. 364	557
Magee *v.* The Queen	5 Ex. Ct. Rep. 391	320
Mallet *v.* Great Eastern Railway Company	[1899] 1 Q. B. 309	263
Marpessa (The)	[1906] P. 14; [1907] A. C. 241	242, 245
Marshall and Scottish Employers' Liability Insurance Company, In re	85 L. T. 757	416
Marshall *v.* Schofield	52 L. J. (Q. B.) 58	233
Martelli *v.* Holloway	L. R. 5 H. L. 532	476
Maunsell *v.* Hedges	2 Ir. C. L. Rep. 88	530
Mediana (The)	[1899] P. 127; [1900] A. C. 113	242, 245
Milbank *v.* Vane	[1893] 3 Ch. 79	479
Miles *v.* Harford	12 Ch. D. 691	499
Millar *v.* Taylor	4 Burr. 2303	341
Mills *v.* East London Union	L. R. 8 C. P. 79	180
Milroy *v.* Lord	4 D. F. & J. 264	332
Mitchell *v.* Tracey	58 Can. S. C. R. 640	167
Monk *v.* Cooper	2 Stra. 763	233
Moore *v.* Harris	1 App. Cas. 318	254
—— *v.* Metropolitan Railway Company	L. R. 8 Q. B. 36	299
Morgan *v.* Rowlands	L. R. 7 Q. B. 493	511
Morrell *v.* Frith	3 M. & W. 402	528
Morrison *v.* Chadwick	7 C. B. 266	218
Morritt *v.* North Eastern Railway Company	1 Q. B. D. 302	265
Moule *v.* Garrett	L. R. 7 Ex. 101	237

N.

Nairn *v.* University of St. Andrews	[1909] A. C. 147; 1909 S. C. (H. L.) 10	348
Neale *v.* Mackenzie	1 M. & W. 747	232
Nevill *v.* Fine Art Insurance Company	[1897] A. C. 68	553
Newcastle (Duke) *v.* Morris	L. R. 4 H. L. 661	343
Newton *v.* Allin	1 Q. B. 518	185
Nicholson *v.* Willan	5 East, 507	265
Norfolk (Earldom) Peerage Claim	[1907] A. C. 10	340

O.

Osborne *v.* Amalgamated Society of Railway Servants	[1911] 1 Ch. 540	443
—— *v.* Milman	18 Q. B. D. 471	167
Owens College *v.* Chorlton-upon-Medlock Overseers	18 Q. B. D. 403	96

P.

Paradine *v.* Jane	Aleyn, 26	222
Paradis *v.* The Queen	1 Ex. Ct. Rep. 191	318
Parana (The)	[1921] 1 A. C. 486	43

		PAGE
Parker, In re	[1910] 1 Ch. 581	475
Pearks *v.* Moseley	5 App. Cas. 714	476
Philips *v.* Philips	3 Hare, 281	511
Pickles *v.* Foster	[1913] 1 K. B. 174	3
Pittam *v.* Foster	1 B. & C. 248	528
Pole-Carew *v.* Craddock	[1920] 3 K. B. 109	178
Pompe *v.* Fuchs	34 L. T. 800	254
Port of London Authority *v.* Orsett Union Assessment Committee	[1920] A. C. 273	98
Preist *v.* Last	[1903] 2 K. B. 148	76
Price *v.* Jenkins	5 Ch. D. 619	333

Q.

Quebec Railway Light, Heat and Power Company *v.* Vandry	[1920] A. C. 662	556
Quincey *v.* Sharpe	1 Ex. D. 72	515

R.

Randall *v.* Newson	2 Q. B. D. 102	77
Ransley, Ex parte	3 Dow. & Ry. 572	131
Redgrave *v.* Hurd	20 Ch. D. 1	422
Reg. *v.* Bolton	1 Q. B. 66	128
—— *v.* Cheshire Justices	8 Ad. & E. 398	151
—— *v.* Coulson No. 1	24 Ont. R. 246	146
—— *v.* Coulson No. 2	27 Ont. R. 59	146
—— *v.* Davidson	8 Man. R. 325	147
—— *v.* Fletton Overseers	3 E. & E. 450	98
—— *v.* Grannis	5 Man. R. 153	147
—— *v.* Herrell	12 Man. R. 198	147
—— *v.* Income Tax Commissioners	21 Q. B. D. 313	158
—— *v.* London School Board	17 Q. B. D. 738	111
—— *v.* Moss	5 Ex. Ct. Rep. 30	320
—— *v.* Oxford (Bishop)	4 Q. B. D. 525	341
—— *v.* Wallace	4 Ont. R. 127	145
—— *v.* Walsh	29 Nov. Scot. R. 521	146
—— *v.* West Middlesex Waterworks	1 E. & E. 716	100
Reid's Brewery Company *v.* Male	[1891] 2 Q. B. 1	170
Rex *v.* Attwood	6 B. & C. 277	100
—— *v.* Borin	29 Ont. L. R. 584	146
—— *v.* Bradford	4 M. & S. 317	100
—— *v.* Bridgewater Trustees	9 B. & C. 68	100
—— *v.* Cantin	11 Ont. W. N. 435	146
—— *v.* Carter	9 Alb. L. R. 481	128
—— *v.* Catt	6 T. R. 332	97
—— *v.* Chandler	14 East, 267	149
—— *v.* Covert	10 Alb. L. R. 349	141
—— *v.* Crisp	7 East, 389	149
—— *v.* Emery	10 Alb. L. R. 139	128
—— *v.* Galway Justices	[1906] 2 I. R. 446	151
—— *v.* Green	9 B. & C. 203	97
—— *v.* Hoffman	28 Man. R. 7	128
—— *v.* Mahony	[1910] 2 I. R. 695	152
—— *v.* Mayor of London	1 C. M. & R. 1	353
—— *v.* Munday	1 East, 584	97
—— *v.* Paulson	[1921] 1 A. C. 271	542

		PAGE
Rex *v.* Pudwell	10 West. W. R. 205	146
—— *v.* Reinhardt	11 Ont. W. N. 346	146
—— *v.* Skingle	7 T. R. 549	118
—— *v.* Smith	8 T. R. 588	144
—— *v.* Thompson	39 Ont. L. R. 108	146
—— *v.* Warnford	5 Dow. & Ry. 489	150
Richards *v.* Delbridge	L. R. 18 Eq. 11	332
Ricket *v.* Metropolitan Railway Company	L. R. 2 H. L. 175	323
Riddell *v.* Glasgow Corporation	1911 S. C. (H. L.) 33	303
Rigby *v.* Connol	14 Ch. D. 482	441
River Steamer Company, In re. Mitchell's Claim	L. R. 6 Ch. 822	510
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	343
Robinson *v.* The Queen	4 Ex. Ct. Rep. 439	320
Rowcroft *v.* Lomas	4 M. & S. 457	528
Rutland's (Countess) Case	6 Rep. 52b	341
Rylands *v.* Fletcher	L. R. 3 H. L. 330	557

S.

Salmon *v.* Smith	1 Wms. Saund. 202	221
Sanders Brothers *v.* Maclean & Co.	11 Q. B. D. 327	41
Sawyer *v.* Ives	Q. R. 4 Q. B. 374	558
Scarsdale (Lord) *v.* Curzon	1 J. & H. 40	474
Scott *v.* Avery	5 H. L. C. 811	253
Sculcoates Union *v.* Hull Dock Company	[1894] 2 Q. B. 69; [1895] A. C. 136	98, 100
Searle *v.* Law	15 Sim. 95	332
Seaton *v.* Burnand	[1900] A. C. 135	553
Shawinigan Carbide Company *v.* Doucet	42 Can. S. C. R. 281	561
Shearer *v.* Shields	[1914] A. C. 808; 1914 S. C. (H. L.) 33	303
Shepherd *v.* Pybus	3 Man. & G. 868	87
Shropshire Justices, In re	14 L. T. 598	152
Sidwell *v.* Mason	2 H. & N. 306	519
Simms *v.* Registrar of Probates	[1900] A. C. 323	54
Simpson *v.* Union Insurance Company	1 H. & M. 618	219
Sinnott *v.* Bowden	[1912] 2 Ch. 414	198
Skinner, In re	6 Qd. L. J. 68	333
Smith *v.* North Metropolitan Tramways Company	7 Times L. R. 459	303
—— *v.* Raleigh	3 Camp. 513	222
—— *v.* Scottish Typographical Association	1919 S. C. 43	444
—— *v.* Thorne	18 Q. B. 134	511
Smith & Son *v.* Moore	[1921] 2 A. C. 13	52
South Eastern Railway Company *v.* Railway Commissioners	50 L. J. (Q. B.) 201	341
Spanish Prospecting Company, In re	[1911] 1 Ch. 92	170
Spence *v.* Chodwick	10 Q. B. 517	234
Spurrier *v.* La Cloche	[1902] A. C. 446	254
Staley *v.* Castleton Overseers	5 B. & S. 505; 33 L. J. (M. C.) 178	98, 123
Stevenson *v.* Lambard	2 East, 575	185
Stile *v.* Finch	Cro. Car. 381	523
Stockport, Timperley and Altringham Railway Company, In re	33 L. J. (Q. B.) 251	324

		PAGE
Stradling *v.* Morgan	Plowd. 199	343
Stretton's Derby Brewery Company *v.* Derby Corporation	[1894] 1 Ch. 431	557
Sumner, Permain & Co. *v.* Webb & Co.	[1922] 1 K. B. 55; 27 Com. Cas. 105	76
Sunderland Overseers *v.* Sunderland Union	18 C. B. (N. S.) 631	97

T.

Tanner, In re	5 N. Z. L. R. 102	333
——— *v.* Smart	6 B. & C. 603	510
Tattersall *v.* National Steamship Company	12 Q. B. D. 297	250
Tennant *v.* Smith	28 S. L. R. 307; [1892] A. C. 150	2, 5
Thellusson *v.* Woodford	1 Bos. & P. (N. R.) 357	479
Thomson *v.* Weems	6 App. Cas. 671	415
Thursby *v.* Warren	Cro. Car. 159	523
Tierney *v.* Halfpenny	9 Vict. L. R. 152	333
Toronto Railway Company *v.* Toronto City	[1920] A. C. 426	131
Trueman *v.* Fenton	2 Cowp. 544	528

U.

Union Insurance Society of Canton *v.* Wills & Co.	[1916] 1 A. C. 281	418
Upton *v.* Townend	25 L. J. (C. P.) 44	222
Usher's Wiltshire Brewery *v.* Bruce	[1915] A. C. 433	170

V.

Vacher & Sons *v.* London Society of Compositors	[1913] A. C. 107	343
Vaughan, Ex parte	L. R. 2 Q. B. 114	149
——— *v.* Burslem	3 Bro. C. C. 101	478
Vézina *v.* The Queen	17 Can. S. C. R. 1	320

W.

Wade *v.* Waldon	1909 S. C. 571	435
Wainwright *v.* Ramsden	5 M. & W. 602; 9 L. J. (Ex.) 120	223
Wallis, Son & Wells *v.* Pratt & Haynes	[1910] 2 K. B. 1003	418
Walsall Overseers *v.* London and North Western Railway Company	4 App. Cas. 30	155
Wensleydale Peerage Case	5 H. L. C. 958	340
Wheelton *v.* Hardisty	8 E. & B. 232	416
Whitehall Court *v.* Ettlinger	[1920] 1 K. B. 680	180
Whitehead *v.* Howard	2 Brod. & B. 372	523
Wiener & Co. *v.* Wilsons, &c., Line	15 Com. Cas. 294	261
Wiltes Peerage	L. R. 4 H. L. 126	357
Wing *v.* Harvey	5 D. M. & G. 265	547

		PAGE
Winstanley *v.* North Manchester Overseers	[1910] A. C. 7	97
Wolfe *v.* Matthews	21 Ch. D. 194	444
Wolverhampton New Waterworks Company *v.* Hawkesford	6 C. B. (N. S.) 336	411
Wood *v.* North British Railway Company	1 F. 562	313

X.

Xenos *v.* Wickham	L. R. 2 H. L. 396	333

Y.

Yea *v.* Fouraker	2 Burr. 1099	521
Yorkshire Insurance Company *v.* Campbell	[1917] A. C. 218	416
Yorkshire Miners' Association *v.* Howden	[1903] 1 K. B. 308; [1905] A. C. 256	444, 463

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY APPELLANTS;

AND

BATER . . . . . RESPONDENT.

H. L. (E.)*
1922
March 13.

Revenue—Income Tax—"Public Office or Employment of Profit"—Clerk in Employment of Railway Company—Liability of Railway Company to Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sch. E, r.* 3—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. E—Income Tax Act*, 1860 (23 & 24 *Vict. c.* 14), *s.* 6.

Upon the true construction of the third rule of the Rules under Sch. E in s. 146 of the Income Tax Act, 1842, the several offices and employments of profit enumerated therein must be public offices or employments of a public nature; and this construction of the rule is not affected by s. 6 of the Income Tax Act, 1860, which makes a railway company assessable to "the duties payable under Sch. E in respect of all offices and employments of profit" held in or under the company:—

So *held* by Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson, Lord Buckmaster dissenting.

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* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

H. L. (E.)
1922
GREAT WESTERN RY. CO. v. BATER.

Dictum of Lord Watson in *Tennant* v. *Smith* [1892] A. C. 150, 159 not followed.

A railway company were assessed to income tax under Sch. E in respect of the salary of a clerk in their employ. The clerk was engaged at an annual salary; his employment might be terminated by either party upon a month's notice; he received payment of his salary during sickness; and on attaining the age of sixty years he would be entitled to a pension. During the year of assessment his salary amounted to 130*l.* plus 45*l.* war bonus:—

Held (Lord Buckmaster dissenting), that he was not the holder of a public office or employment of profit of a public nature within Sch. E, and that consequently the railway company were not liable to assessment in respect of his salary.

Attorney-General v. *Lancashire and Yorkshire Ry. Co.* (1864) 2 H. & C. 792 discussed.

Decision of the Court of Appeal [1921] 2 K. B. 128 reversed.

Per Curiam: Income Tax Commissioners, in stating a case for the opinion of the Court, should not express their decision in the form that they were of opinion that the contentions put forward on behalf of the one side or the other should succeed, but should state separately and distinctly their conclusions of fact and their conclusions of law.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question for determination was substantially whether the appellant railway company were rightly assessed to income tax under Sch. E of the Income Tax Act, 1853, and the rules relating thereto in s. 146 of the Income Tax Act, 1842, in respect of the profits of the office or employment of a clerk in their employ as being a person holding a public office or employment of profit of a public nature or whether the assessment should have been made under Sch. D of the Income Tax Act, 1853, upon the clerk himself in respect of the profits of an employment within the second case of Sch. D in s. 100 of the Income Tax Act, 1842.

The appellant company were assessed to income tax under Sch. E in the sum of 175*l.* for the year ending April 5, 1918, in respect of the office or employment of profit held in or under the appellant company by one W. H. Hall, who was a clerk in the service of the company.

(1) [1921] 2 K. B. 128. (2) [1920] 3 K. B. 266.

The facts, which were not in dispute, are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgments of their Lordships. Upon an appeal by the company to the Special Commissioners the appellants contended (inter alia) that upon the true construction of Sch. E the junior members of the staff of a railway company such as Mr. Hall did not fall within its scope and that the appellants were not liable to be assessed under Sch. E in respect of his salary, but that the proper way to assess the salary was to assess Mr. Hall personally under the second case of Sch. D upon the average of the emoluments of his employment during the three preceding years.

The respondent contended (inter alia) that Mr. Hall did hold an office or employment of profit falling within Sch. E as explained by the third rule in s. 146 of the Income Tax Act, 1842, and that the appellants were accordingly rightly assessed in respect of the salary thereof.

The Special Commissioners gave their decision in the following terms: "We the Commissioners who heard the appeal were of opinion that the contentions put forward on behalf of the Crown should succeed and we therefore confirmed the assessment."

Rowlatt J. affirmed the decision of the Commissioners, as he considered that the case was covered by what he conceived to be the basis of the decision in *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1), and his decision was affirmed by the Court of Appeal (Lord Sterndale M.R., Scrutton and Younger L.JJ.) upon the ground that the question was one of fact and that the finding of the Commissioners could not be disturbed.

1922. Feb. 23, 24. *Disturnal K.C.* and *Hon. Geoffrey Lawrence* (with them *Besly*) for the appellants. Sch. E relates only to public offices and employments of profit. The first question therefore is what is an office? Upon this point the appellants desire to adopt the personal opinion of Rowlatt J.

(1) 2 H. & C. 792.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER.

that an office, in the sense in which the word is used in this schedule, means a post which has definite duties attaching to it and has a continued existence apart from the particular person who holds it. This is made clear by the language of the first rule under that schedule, which provides for the case of a successor in the employment. There is a clear distinction between an officer and a mere servant. The words "employment of profit" are used as the equivalent of "office" and in the sixth rule the word "officer" is used to cover both. Otherwise an employment of profit would include the case of an engine driver or an office boy, but the contrary has been held. A third-grade clerk in a railway company in the position of Mr. Hall is not the holder of an office. He performs merely such duties as may be assigned to him from time to time, and if he left he would not have a successor, but his duties would be assigned to other clerks in the office. Then Sch. E contemplates that the office or employment of profit shall be of a public nature. No doubt a difficulty is caused by the language of the third rule. The rule begins by saying: "The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned in Great Britain (videlicet)," and the list which follows includes "any office or employment of profit held under any company or society," omitting the word "public." Then the rule concludes with the words "and every other public office or employment of profit of a public nature." Reading the rule as a whole it is submitted that it extends only to such offices or employments under a company as are of a public nature. Sect. 6 of the Act of 1860, under which the appellants have been assessed, speaks of "the duties payable under Schedule (E.) in respect of all offices and employments of profit held in or under any railway company." That carries the matter no further. *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1), the reports of which vary considerably, merely decides that an engine driver is not within Sch. E; it decides nothing at all as to clerks.

(1) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95; 13 W. R. 8; 10 Jur. (N. S.) 705.

Although the railway company admitted that clerks were within the schedule the Court gave no support to that view. In *Tennant* v. *Smith* (1) the question for decision was whether the yearly value of a house which the appellant was entitled to occupy rent free as manager of a bank was to be included in his income, and for this purpose it was immaterial whether he was assessable under Sch. D or Sch. E, but in that case Lord Watson expressed an opinion obiter that he was assessable under Sch. E. Assuming that opinion to be correct, the case of a bank manager differs from that of a clerk in that the former is an officer while the latter is a mere servant of the company. In *Berry* v. *Farrow* (2) Bankes J. expressed a similar opinion in regard to the manager of a limited company, but that case is distinguishable upon the same principle. The Court of Appeal have taken the view that the decision of the Commissioners was a conclusion of fact and that, as the Court could not say that there was no evidence to support the conclusion of the Commissioners, they ought not to interfere with that decision; but, first, the Commissioners have not found as a fact that Mr. Hall was the holder of an office or employment within Sch. E, and, secondly, the question whether the remuneration for such employment falls within Sch. D or Sch. E is a question not of fact but of law.

Sir Ernest Pollock S.-G. and *Reginald Hills* (*Sir Gordon Hewart A.-G.* with them) for the respondent. Prima facie r. 3 of the Rules under Sch. E applies to every employment held under a company, but the Courts have held that so to construe the rule would lead to results which would be repugnant to common sense. They have therefore restricted the application of the rule to employments which have a measure of permanence or continuity. Accordingly it has been held that servants employed at weekly wages are not within the schedule. In *Tennant* v. *Smith* (3) Lord Halsbury agreed with Lord Adam's opinion in the Court of Session (4) that the appellant was assessable under Sch. E and that

(1) [1892] A. C. 150, 159.
(2) [1914] 1 K. B. 632.
(3) [1892] A. C. 150, 155.
(4) (1891) 28 S. L. R. 307, 315.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER.

Sch. D applied to such employments only as were not contained in Sch. E. In *Berry* v. *Farrow* (1) again the plaintiff was held to be assessable under Sch. E; but it was impossible to give any public character to the man's employment. He was the manager of a company incorporated to work a particular patent and the only publicity in the matter was that this was a company registered under the Companies Acts. In *Pickles* v. *Foster* (2) the appellant was an agent of a company in West Africa and the question for determination was whether his employment was exercised wholly out of the United Kingdom, but he was assessed under Sch. E, and that was accepted without demur. Again in *Fergusson* v. *Noble* (3) it was assumed that a detective officer was taxable under Sch. E. These authorities illustrate the inclusive character of Sch. E and show that prima facie it embraces all employments. Even upon the restricted construction of Sch. E adopted by the Courts Mr. Hall's employment falls within the schedule. He is a member of the salaried staff of the railway company, he is engaged at an annual salary, he is entitled to payment in time of sickness, and in due course he will become entitled to a pension. These circumstances give to his employment the necessary quality of permanence. Neither in ordinary practice nor in the arguments in the cases has it been disputed that an employment of this kind is within the schedule, yet it is now sought to reverse a practice which has existed for sixty years. As to publicity, the Courts have decided that the publicity to be regarded is the publicity of the concern in which the man is employed. It must be a concern of a public character, and the Act of 1860, which is a legislative interpretation of the rule, shows that a railway company is such a concern. There is no question of any duty to the public. The Legislature had in mind the character of the employers. They were to be employers of a public character and employers who would be likely to have servants to whom they would give continuous employment. *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (4) is

(1) [1914] 1 K. B. 632.
(2) [1913] 1 K. B. 174.
(3) (1919) 7 Tax Cas. 176.
(4) 2 H. & C. 792.

distinguishable because in that case there was no expectation of certainty of employment.

Disturnal K.C. replied.

The House took time for consideration.

1922. March 13. LORD BUCKMASTER. My Lords, the question raised upon this appeal is whether the appellants, the Great Western Railway Company, are primarily liable to pay income tax upon the salary earned by Mr. W. H. Hall, who is a clerk in their employment.

The facts are not in dispute. Mr. Hall entered the service of the appellants in 1897, at the age of fourteen years, as an office boy. In 1899 he was appointed a lad clerk, and in 1901 a clerk in the service of the company. His salary as a clerk is estimated at a yearly sum, and during the period in question was at the rate of 130*l.* per annum, together with a war bonus of 45*l.* Although the salary is annual, it is payable every twenty-eight days on the basis of $\frac{28}{365}$ths of the total amount, and in practice the payment is made once a fortnight. His service is liable to termination by a month's notice on either side, and in case of sickness he is entitled to receive full pay for the first twenty-eight days and five-sixths for the period of six months after the expiration of the twenty-eight days. He is also a member of a superannuation scheme under which he will, on attaining the age of sixty (provided he be still in the company's service), be entitled to a pension.

During the year in question, which ended on April 5, 1918, his employment would be correctly described as being that of a clerk in the superintendent's office of the appellant company at Swindon.

The appellants were assessed to income tax under Sch. E in the sum of 175*l.* for this year, the ground of the assessment being that they were liable because Mr. Hall held an office or employment of profit under the company. The question is whether under Sch. E of the Income Tax Act that assessment was properly made, or whether it should have been assessed directly upon Mr. Hall.

H. L. (E.) 1922 — GREAT WESTERN RY. CO. v. BATER. — Lord Buckmaster.

It is unnecessary to describe again the method by which income tax is imposed under the statutes of 1842 and 1853, nor is it profitable to lament the confusion which those provisions create. Schs. D and E are the ones relevant for the present consideration; and although alphabetically D precedes E, it is agreed that for purposes of the income tax the alphabetical order must be reversed and D must be read as following instead of preceding the other letter.

Sch. E provides that the duties shall be annually charged on the persons using or exercising the offices or employments of profits mentioned in the schedule for all salaries, fees, wages, perquisites or profits accruing by reason of such offices, and the third rule of the schedule, which is the most important for the present purpose, runs in the following words: "Third.—The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet,) any office belonging to either House of Parliament, or to any Court of Justice, whether of law or equity, in England or Scotland, Wales, the Duchy of Lancaster, the Duchy of Cornwall, or any criminal or justiciary or ecclesiastical court, or court of admiralty, or commissary court, or court-martial; any public office held under the civil government of her Majesty, or in any county palatine, or the Duchy of Cornwall; any commissioned officer serving on the staff or belonging to her Majesty's army, in any regiment of artillery, cavalry, infantry, royal marines, royal garrison battalions, or corps of engineers or royal artificers; any officer in the navy, or in the militia or volunteers; any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate; any office or employment of profit under any public institution, or on any public foundation, of whatever nature or for whatever purpose the same may be established; any office or employment of profit in any county, riding, or division, shire or stewartry, or in any city, borough, town corporate, or place, or under any trusts or guardians of any fund, tolls,

or duties to be exercised in such county, riding, division, shire, or stewartry, city, borough, town corporate, or place; and every other public office or employment of profit of a public nature."

The Income Tax Act of 1860 provides for assessment on the railway company of profits or gains, and by s. 6 it enacts as follows: "6. In like manner as aforesaid the commissioners for special purposes shall assess the duties payable under Schedule (E) in respect of all offices and employments of profit held in or under any railway company, and shall notify to the secretary or other officer of such company the particulars thereof, and the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied accordingly; and it shall be lawful for the company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profit and gains."

There is no dispute, therefore, that the railway is liable to be directly assessed in respect of certain payments made by them to their employees, and the question is whether the occupation of Mr. Hall renders them liable in respect of his remuneration. For the appellants it is contended that they are not, for this reason: that it is impossible to read the third branch of Sch. E without seeing that the word "public" governs all the offices and employments that are therein mentioned. The word is found at the beginning of the rule; and though it is omitted before the phrase "any office or employment of profit held under any company or society," yet the rule concludes with the words "every other public office or employment of profit of a public nature," and effect cannot be given to those words without assuming that all the preceding provisions are similarly qualified by the word "public." It is then said that the occupation of Mr. Hall cannot possibly be regarded as public, and that consequently he is liable to be assessed under Sch. D and the company is free from assessment under Sch. E.

Did the third rule stand alone, I think this argument would admit of no answer, but it must be accepted that the

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Buckmaster.

statute of 1860 has expressly declared that a railway company is to be directly assessed in respect of all offices or employments of profit held in or under them, and this leads to one of two results, either all offices or employments of profit under the railway company are liable, or a certain qualified number are, which have to be designated as "public."

I find myself unable to accept this latter interpretation because I cannot see how any one office held under a railway company is more public than another. The real meaning of a public office is an office the payment for which is not provided out of a private fund, and directly it is assumed that an office or employment of profit under a railway company may be public the distinctive value of the word is destroyed. Further, if the offices and employments of profit can be divided so that some are preferably regarded as public and others not, then the Act of 1860 made no change in the position, since for the public offices and employments of profit the company were already liable under the third rule. To my mind it follows that the only meaning attributable to that rule is that all offices or employments of profit under the railway company are within the scope of the Act of 1860, as they are in terms stated to be.

It is then pointed out with great force that as long ago as the decision in *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1), reported in many reports, of which Hurlstone & Coltman's is sufficient for purposes of reference, engine drivers, porters, and labourers were held to be outside the statute, and yet none the less each of the men employed on these classes of work would normally hold an employment of profit. It is indeed difficult to know how any branch of service can be excluded upon the view I take as to the meaning of the section, but even if I differed from the earlier decision I should not hesitate to accept it as an authority now, having regard to the subject matter of the dispute and the length of time that has elapsed during which the practice established has been obeyed.

It becomes, therefore, necessary to see whether there is

(1) 2 H. & C. 792; 33 L. J. (Ex.) 163; 10 L. T. 95; 13 W. R. 8.

anything to distinguish the employment of Mr. Hall from that of, for example, the engine driver. It certainly cannot be found in the amount of his salary, and yet there are marked distinctions between the two services which have an important bearing upon the point. It may be difficult to draw a distinction between salary and wages ; in substance and essence there is none, and yet wages do imply a daily or a weekly payment, or a payment by the job, and not, as in the case of Mr. Hall, a fixed annual sum calculated by the year and only paid at frequent intervals for purposes of convenience. Again, although Mr. Hall's work is not permanent, seeing that he can be dismissed at a month's notice, yet the circumstances associated with it point to a view, accepted by both parties, that it will continue. The provision as to sickness is a notable instance, and so also is that with regard to the pension fund. Whether he holds the " office " of a clerk, I hesitate to say, but he is definitely in the employment of the company on terms other than that of a weekly wage, and these are, I think, the distinctions that justify the Crown in their contention that the railway company is liable to be assessed directly, and not Mr. Hall.

This conclusion is, I think, strengthened by observing that deduction of income tax at the source in respect of weekly wages is impracticable, but it is relatively easy in the case of a yearly salary. There are no cases in which this point has been determined, but two, *Tennant* v. *Smith* (1) and *Berry* v. *Farrow* (2), in which it has been assumed, though in neither case was its determination or assumption necessary for the decision.

I do not pretend that the opinion I hold rests on any firm logical foundation. Logic is out of place in these questions, and the embarrassment that I feel is increased with the knowledge that my views are not shared by other members of the House, but this fact is not surprising. It is not easy to penetrate the tangled confusion of these Acts of Parliament, and though we have entered the labyrinth together, we have unfortunately found exit by different paths.

(1) [1892] A. C. 150. (2) [1914] 1 K. B. 632.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER.

LORD ATKINSON. My Lords, the Commissioners for the special purposes of the Income Tax Act have in this case adopted a mode of framing the case they have stated which is, I think, both objectionable and embarrassing. Their determinations of questions of pure fact are not to be disturbed any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs. With their rulings upon questions of law it is entirely different. The Court of Review is quite entitled, indeed I think bound, to overrule their decisions if they think them erroneous. What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact. What is the proper construction of a statute, or of any other printed or written document, is a question of law. In this case the appellants contend for one construction of r. 3 of Sch. E of the Income Tax Act of 1842, if not as well of the fifth and sixth sections of the Income Tax Act of 1860. The respondents contend for another and different construction of each of these enactments, certainly of the first. Their respective contentions are set forth in paras. 4 and 5 of the case stated. The conclusion at which the Commissioners arrive is thus stated: "We the Commissioners who have heard the Appeal were of opinion that the contention put forward by the Crown should succeed, and therefore we confirmed the assessment." But that must mean that they have decided (1.) that the construction of the above-mentioned statutes contended for by the Crown was their true construction, and (2.) that the facts which they held were proved were enough to bring this case of Hall's within this r. 3, Sch. E, so construed. If they had stated clearly what was their conclusion upon the first matter, your Lordships could

overrule this if you considered them in error. While, however much you might disagree with their conclusion on the second matter, you could not disturb it if you found that there was sufficient evidence before them to sustain this conclusion. It is essential, therefore, that the Commissioners should when stating a case clearly set forth the conclusions of law at which they have arrived, and separate and distinct from these the conclusions of fact at which they arrived. That is the proper and convenient course to follow. Any other only leads to embarrassment. I cannot agree that the question in dispute between the parties in this case is, as is apparently held by the Court of Appeal, merely a question of fact. One has first to construe those puzzling enactments, Sch. E, r. 3, of the Act of 1842, and then s. 6 of the Act of 1860, and having arrived at their meaning determine whether the facts proved bring Mr. Hall's case within them.

I do not think the expressions found in this r. 3—namely, "public offices" and "employments of profit," or "public employment of profit," whichever it be, are synonymous expressions. I think they are used to denote two different things. It is by no means easy, however, to define or describe what is the difference between these things. The rule opens with the words "the said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain (videlicet)." All that follows is, in my view, an enumeration of the several things which are of the class mentioned—namely, public offices and public employments of profit or employments of profit of a public nature, whichever it be. The last two lines of the rule show, I think, that this must be so. There are found the significant words "and every other public office or employment of profit of a public nature." The offices referred to in the rule must, therefore, be public offices, and "the employments of profit" must be either public employments of profit or, what is very much the same thing, "employments of profit of a public nature." The first rule of Sch. E throws a little light upon the proper

H. L. (E.) 1922 — GREAT WESTERN RY. CO. v. BATER. — Lord Atkinson.

construction of the third rule. It provides that the duties (i.e., the tax) shall be annually charged upon the persons respectively having, using or exercising the offices or employments of profit mentioned in Sch. E, or to whom the annuities, pensions or stipends mentioned in the same schedule shall be payable for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices, employments or pensions after making the deduction named. Then comes a provision confined entirely to the offices and employments already mentioned. It runs thus: "Each assessment, in respect of such offices or employments shall be in force for one year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the person for the time being having or exercising the same." That is, the tax for the year shall be assessed upon the person holding the office or exercising the employment at the time the assessment is made. A proviso is then introduced adjusting, when the change contemplated has taken place, the burden of the tax between the persons who together have filled the office or exercised the employment during the entire year of assessment. It runs thus: "Provided that the person quitting such office or employment, or dying within the year, or his executors or administrators, shall be liable for the arrears due before or at the time of his so quitting such office or employment, or dying, and for such further portion of time as shall then have elapsed, to be settled by the respective Commissioners, and his successor shall be repaid such sum as he shall have paid on account of such portion of the year as aforesaid." Thus the entire year of assessment seems to be treated as a unit of service, and the salary as a unit of recompense, not an aggregate of a number of smaller sums payable at different times, and each recompensing the service rendered during an independent fraction of the year. Again, the word "successor" is very significant. It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other. Employment of profit, if

it be not identical with office, is thus treated as something closely akin to it.

I fully concur in the opinion happily expressed by Rowlatt J. in the following passage of his judgment (1): "It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain things, and the so-called office or employment was merely the aggregate of the activities of the particular man for the time being. I myself think that that contention is sound, but having regard to the state of the authorities I do not think I ought to give effect to that contention. My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office." Railways are not named in the catalogues of subjects to which r. 3 applies. Sect. 6 of the Act of 1860 is designed, I think, to remedy this omission. It provides, in a clumsy way, that the Commissioners for special purposes shall assess the duties payable under Sch. E in respect of all offices and employments of profit held under any railway company. But the only duties assessed on offices or employments of profit under Sch. E are those assessed on public offices or employments of profit which are either "public" or of a public nature, and the effect of s. 6 of the Railway Act is on this point, I think, merely to write into this third rule the words "railway company." No doubt the section goes on to provide that the duties payable in respect of these offices and employment shall be assessed upon and paid by the railway company,

(1) [1920] 3 K. B. 274.

H. L. (E.) 1922 — GREAT WESTERN RY. CO. v. BATER. — Lord Atkinson. —

and by them deducted from the fees, emoluments, or salary of each such officer or person. A method is thus devised for, as it were, deducting the tax at the source. The authorities to which your Lordships have been referred do not afford much assistance. In *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1) the question actually decided was not at all identical with that raised in the present case. That case came before the Court as a special case stated for its opinion. The opening lines of the first paragraph of the case set forth the relevant facts. The company stated that they had in their employment for the purposes of their business many officers, clerks and servants; that of these some were engaged at fixed annual salaries payable in some instances by quarterly payments, in other instances by monthly payments, that their engagements were terminable by either party giving to the other in some instances a year's notice, in other instances a half-year's notice, in other instances a quarter of a year's; that failing such notice these engagements would continue and would not require to be renewed by either party in order to prevent them coming to an end.

The third paragraph of the case runs as follows: "The defendants, however, although willing to comply with this requisition (i.e., the requisition made under Section 6 of the Act of 1860) as regards such of their officers, clerks and servants as are engaged at annual salaries, have refused to comply with it in respect of those engaged at weekly wages." And the question for the decision of the Court is in para. 5 stated to be "whether the defendants are liable to be assessed under Schedule E in respect of their officers, clerks or servants who are so engaged as aforesaid at weekly wages as well as in respect of those engaged at annual salaries." The headnote of the case in this report is not quite accurate. It is expressly stated in the report, however, that the judgment of the Court was delivered by Martin B. He said (2): "This is a special case for the opinion of the Court, and the question is, whether the defendants are liable to be assessed under Schedule (E.) of the Income Tax Act (5 & 6 Vict. c. 35 and succeeding

(1) 2 H. & C. 792. (2) Ibid. 810.

statutes) in respect of their engine-drivers, porters, and labourers engaged at weekly wages. The defendants have persons in their employment as engine-drivers, porters, and labourers at wages of 40*s.* per week and upwards, and if their wages during the year amount to 100*l.* they are liable to Income Tax." He then quotes the sixth section of the Act of 1860 (23 Vict. c. 14, s. 6), and says: "If the duties upon such persons as the engine-drivers, porters and labourers of a railway company are not payable under Schedule (E.), the defendants are entitled to the judgment of the Court, and we are of opinion that the duties are not payable under Schedule (E.), but are payable under Schedule (D.)." From the use of the word "we" it would appear clear that the learned Baron was delivering the judgment of the Court. Further on in his judgment he is represented as saying: "The third rule in Schedule (E.) (s. 146) enacts that duties under this schedule shall be paid on all public offices and employment of profit of the description thereinafter mentioned, viz. offices belonging to the houses of parliament, courts of law and equity, offices in the army, offices of profits under any public corporation, and a variety of others; and finally, every other public office or employment of profit of a public nature. We think Schedule (E.) extends only to offices or employment under corporations which are of a public nature, and not to workmen or artizans like engine-drivers, porters and labourers. They hold no public office whatever, and in our opinion are within Schedule (D.) and not within Schedule (E.)." The report of this case in 33 L. J. (Ex.) 163 is different. It represents Pollock C.B. as having delivered the first judgment and Martin B. the second. The former learned judge is represented to have used the following words in reference to r. 3 of Sch. E. "The rule says: 'The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned'; and then gives a long list of offices in the Houses of Parliament, in the Courts of Justice, under the Civil Government, or in any County Palatine, under any Ecclesiastical body, whether aggregate or sole, or under any public corporation

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Atkinson.

or under any company or society, whether corporate or not corporate, under any public institution, or on any public foundation, in any county or riding, and concludes with the words: 'every other public office or employment of profit of a public nature.'" He then proceeds to deal with Sch. D, and winds up his judgment with the following passage: "The foundation of my judgment is this, that the provision under which we are asked the question whether the defendants are liable to be assessed for this class of servants (that is to say, the third rule of Sch. E for charging duties), gives a description of the office, and distinctly throws the liability to pay the tax upon persons who are employed in an office or employment of profit of a public nature; and I am of opinion that, therefore, the defendants are not liable to be assessed under Schedule E in respect of such servants." The judgment of Martin B. in this report is substantially to the same effect as in the other report. Channell B. and Pigott B. are represented as concurring.

In *Tennant* v. *Smith* (1) the question raised for decision was entirely different from that raised in the present case. It was this: the appellant was a manager of the Bank of Scotland at Montrose. He was obliged by reason of his office to live on the bank premises. For this privilege he did not pay any rent, but was unable to let the portion of the premises which he occupied. By the Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), it was provided that any person assessed to income tax who proves that his total income from all sources is less than 400*l.* shall be entitled to be relieved from the duty on 120*l.* of such income. The question for the opinion of the Court on a special case stated was whether the yearly value of the appellant's privilege of free residence on the bank premises could, or could not, be brought into account in estimating his income from all sources. The House decided that it could not be brought into account for that purpose. That was the sole and only question upon which any decision was asked or given. Lord Halsbury,

(1) [1892] A. C. 150, 159, 163, 164.

indeed, indicated that the case could not come within Sch. E, as the "perquisites" and "profits" mentioned in r. 1 of that schedule are to "be payable," and that the occupation of a house was irreconcilable with these words. Lord Macnaghten expressed the opinion that Sch. E only applied to money payments and payments convertible into money. Lord Morris expressed an opinion to the same effect. No doubt Lord Watson says: "I agree with your Lordships that income arising from employment as a bank agent is assessable under Schedule E in all cases where the bank which employs him is a company or society, whether corporate or not corporate, as specified in the third rule of that schedule." The companies and societies, however, specified in the rule, are, in my view, only those to which the words "public office or employment of profit of a public nature" apply. This expression of opinion by Lord Watson cannot, I think, be extended to companies or societies which do not satisfy these conditions. In *Berry* v. *Farrow* (1) Bankes J. (as he then was), when trying a case without a jury, expressed an opinion that a person who had been appointed manager of a limited liability company, whose registered office was in the City of London, was assessable under Sch. E. In *Fergusson* v. *Noble* (2) the appellant, a detective officer in the employment of the Police Department of the Corporation of the City of Glasgow, was allowed a sum of 11*l.* 14*s.* 3*d.* for clothing, and claimed that this sum was improperly included in a sum of 149*l.* 10*s.*, the amount he received, on which income tax was assessed. It was held that the allowance was a payment accruing to this constable by reason of his office and was assessable for income tax under Sch. E. No point was raised as to whether the detective was a public officer or not, or whether he exercised an employment of profit or not, within the meaning of r. 3 of that schedule.

The next question, by no means an easy one to answer, is: Does Hall's case come within r. 3 as so construed? He began life as an office boy at fourteen years of age. He was

(1) [1914] 1 K. B. 632, 637. (2) 7 Tax Cas. 176.

H. L. (E.) 1922 — GREAT WESTERN RY. CO. v. BATER. — Lord Atkinson.

then employed in the Divisional Office at Swindon. In February, 1899, he was appointed a lad clerk, and in 1901 a clerk. His salary was annual, payable every twenty-eight days on the basis of $\frac{28}{365}$ths of the annual amount, but in practice about half this sum was paid every fourteen days. There never had been any written agreement between Hall and the appellant company providing for the amount of the salary, its possible increases, or its times of payment. A practice had been introduced since he entered the service of the company by which the salaries of a clerk were increased by annual increments of 5*l.* till they reached 100*l.* per annum. After that, advances depended on merit, but the actual salary of Hall during the year in question was 130*l.* per annum or 50*s.* per week. An added war bonus of 45*l.* brought it up to 175*l.* per annum, or something less than 3*l.* 7*s.* 4*d.* per week, and he was thus liable to income tax. His employment as clerk might be terminated by a month's notice given by either party, failing which notice the employment continued and would not be required to be renewed at the instance of either party. Hall was paid this salary during his holidays, and in case of sickness he was paid at this full rate for the first twenty-eight days of his illness and five-sixths of the full rate for six months from the expiration of these twenty-eight days. Much reliance was placed by the Solicitor-General on behalf of the respondents on the condition necessary to be fulfilled by a clerk on entering the service of the company, and also on the provisions of the superannuation scheme established by the company, of which scheme Hall became a member. According to the rules, a candidate must be between eighteen and thirty years of age, must be a good writer and expert calculator. His salary, the amount or limits of which are not named, has to be regulated by his efficiency and general knowledge and conduct. He must, on appointment, hold himself in readiness to proceed to duty immediately on being summoned to whatever station or place may be directed. He must, if required, learn Pitman's or some other system of shorthand. If he should leave the service without giving previously the month's notice stipulated for, all pay then

due to him was to be forfeited, and he was liable to immediate dismissal without any notice for incompetency, misconduct, or dishonesty. And he must have a certificate from a medical man that he is free from any infirmity of body or mind, and is of sound constitution and in good health. It is obvious that as far as these conditions indicate the duties of such a clerk they must be performed in his office, and are due to his employers alone. He does not, apparently, come in contact with the public in any way, or owe any duties to, or do any service for any of its members, no more than does a book-keeper in a merchant's counting house. His salary is, as things now go, small, and his only necessary mental equipment is that he should be an expert calculator. It is not stated whether he has ever been required to learn shorthand or to use a telegraph instrument, or whether he can write shorthand or use such an instrument.

The provisions of the superannuation scheme do not afford any real assistance. Those persons who are eligible to be members of it are (*a*) members of the superannuation fund and (*b*) every person under forty years of age whose name is included on the registry of "the salaried staff" kept by the company, and is not a member of the other provident society of this company, or of any superannuation or pension fund to which the company subscribes. Each member must pay to the scheme 3 per cent. upon his actual income. No definition of "salaried staff" is given, but in the third paragraph of the rules of the scheme a distinction is drawn between "officers" and "clerks." It provides that the directors of the company may admit to membership of the superannuation scheme any "salaried officer or clerk under 40 years of age who may be employed on a railway leased to or worked by the appellant company." Such being the nature of Hall's qualifications, employment and duties, I am unable to come to the conclusion that he holds in the service of the appellant company a public office, or an office of a public nature, or exercises a public employment of profit, or an employment of profit of a public nature within the meaning of Sch. E, s. 2, of the Income Tax Act, 1853, and r. 3 of Sch. E to s. 146

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Atkinson.

of the Income Tax Act of 1842. No doubt he is paid an annual salary, not a weekly wage, but that fact—though important—is not at all crucial.

I am of opinion, therefore, that the appellant company has not been rightly assessed on behalf of W. H. Hall under Sch. E of the Income Tax Acts, that the decision appealed from was erroneous, and should be reversed, and the appeal be allowed with costs here and below.

LORD SUMNER. My Lords, as it is only through s. 6 of 23 Vict. c. 14 that the Great Western Railway Company can be taxed in respect of Mr. Hall's earnings, it is with that section that we must begin. Its effect is, that such of the duties payable under Sch. E as are payable in respect of Mr. Hall's office or employment of profit, if he has one, in or under the company shall be assessed on and paid by the company, subject to its right to deduct out of the fees, emoluments or salary of the officer or person the duty so charged in respect of his profits or gains. Next we gather from Sch. E that, if the Crown is to succeed, Mr. Hall must be an officer or person enjoying an office or employment of profit in or under the company, which must yield him fees, emoluments or salary, out of which the company can deduct the duty charged on them in respect of his profits or gains. The proposition is one of some complexity. Sect. 6 itself implies that, whatever Sch. E covers, some of the offices or employments of profit which it covers, if not all, can be such offices or employments as are held under a railway company. Accordingly, if all offices and employments under Sch. E have to be such that they can be called "public," in the sense in which Sch. E uses that word, then it follows that there are some offices or employments held under a railway company which are public in that sense, but whether they are many or few, and what they are, and whether Mr. Hall holds one of them, are questions which this section does not help us to answer.

Let us now turn to Sch. E. Under its first paragraph, the persons charged are those who have, use or exercise the

offices or employments of profit mentioned in the said schedule, and the duties are to be charged for all salaries, fees, wages, perquisites or profits whatsoever, accruing by reason of such offices or employments. Having been thus charged, the duties are to be paid on all public offices and employments of profit of the description thereinafter mentioned within Great Britain, videlicet, five named groups (I cannot call them species) of offices and employments, and every other public office or employment of profit of a public nature. It seems to me that the structure of para. 3 of Sch. E, beginning as it does with "all public offices," etc., and concluding with "every other public office" implies on the ordinary principles of construction, that every office or employment in the five groups, whether the word "public" is expressed or not in immediate connection with it, is and must be a public office or employment in whatever quality such publicity may consist. I am aware that in *Tennant* v. *Smith* (1), Lord Watson, whose authority stands unsurpassed, seems to have held a contrary opinion, but this point was not the issue which the House then was called on to decide, and no other noble and learned Lord expressed that view. I do not discuss the point further, for, after all, publicity is just as vague a differentia of the species, to which it is contended that Mr. Hall belongs, as any other, and the difficulty of the case is that it is defined by a number of differentiæ, all of which are exceedingly indefinite. There is, however, a little more to be gathered from Sch. E. The office or employment must be something capable of being so assessed, that the assessment can be in force for one whole year, and that, notwithstanding that a change may have taken place in it, the duty can be levied for such year without any new assessment on the person for the time having or exercising the same. If the person on whom the assessment is levied (who evidently is in this case the officer and not the company, which employs and is assessed in respect of him) dies within the year or quits his office, the prescribed adjustments involve that he should have or might have a successor in that office

(1) [1892] A. C. 150, 159.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Sumner.

or employment. The other paragraphs of the schedule throw an even less direct light on its meaning in the present connection, but such as it is, I think it is of no assistance to the Crown, but rather the contrary. They need not, however, be minutely examined.

My Lords, one sometimes gets help in construing such provisions from considering the practical objects, which they may be supposed to serve. The object of the sixth section of the Act of 1860 is plain enough. It is to throw on the railway company work which would normally be performable by the officers of the Inland Revenue: to save the Crown the cost and uncertainty of collecting the tax directly from the subject chargeable, by enabling it to be charged on another subject, who is not really liable at all. The excuse is that it is easier for the company to recoup itself than for the Crown to collect the tax direct. In substance, though not in name, the arrangement taxes the company to the extent of the cost of the collection; and this, as always, requires, or is supposed to require, the use of clear words of charge, but the burthen is passed to the company in this instance, in terms that for income tax law are quite unusually clear. The obscurity is in the terms of the original charge. As for the object of Sch. E, at least in connection with any such office or employment as Mr. Hall can possibly hold, I confess it is beyond me. Provided his emoluments are sufficient to be taxable at all, if he escapes from Sch. E he comes under Sch. D, and in either case he suffers the same rate of tax. The differences in computation and assessment between the two schedules, if they affect his case, are not such as to assist in the application of Sch. E to it.

I will begin by picking out of Sch. E the terms most favourable to the Crown, and divorcing them as far as possible from any context that might weaken their effect, and I will then inquire whether, when applied to the facts found by the Commissioners, they bring Mr. Hall's case legally within the Act of 1860. Does Mr. Hall hold, under a company corporate, any office or employment of profit, public or not

public, but such that salaries, fees, wages, perquisites or profits accrue to him by reason of it, and such that, if he should die within the year of assessment, he would have a successor, who could be made to pay any arrears of duty due before the time of his death, subject to being recouped for his payment by Mr. Hall's executors? This appears to be the question. The Commissioners have found what Mr. Hall's position is in fact. He is and has been since boyhood a clerk in the service of the Great Western Railway. He is about thirty-nine years of age. He receives a "salary," an annual salary, payable by fortnightly instalments, which in the year in question was altogether 175*l.* At first it mounted by small annual increments, but, since it reached 100*l.* a year, further advances have depended on merit. There is no written agreement, but the employment continues, till it is terminated by a month's notice on either side. He receives it equally during limited periods of holidays and sickness as when he is at work. He discharges clerical duties not otherwise specified; and has to do so wherever required. He might have been called on to learn shorthand and telegraphy. Whether he has been so called on we do not know. In plain language he is in a situation as a clerk at a modest salary. Nothing is stated as to the total number of other clerks employed, or of those in his grade. We are not told whether their work is uniform or fluctuating, or whether their number is fixed or variable. He is a member of the superannuation scheme so long as he remains with the company, and in ordinary course will be pensionable some day. At present he is in the divisional superintendent's office at Swindon, whatever that involves, and he is called a member of the "permanent" staff, and enjoys such permanency, I suppose, as a month's notice allows. My Lords, to say that Mr. Hall holds an "office" seems to me to be an abuse of language, and to say that his employment is one "of profit" is pompous and obscure, but it may be one "of profit" notwithstanding. At any rate I would not on that ground say that he is not within the language of Sch. E.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Sumner.

The finding of the Commissioners in my view turned on a particular interpretation of the effect of the decision in the case of *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1) In a form now common, which, however, neither does justice to the Commissioners' own great experience and acumen, nor gives to the Courts all the information to which they are entitled, the case stated says that the Commissioners were of opinion that the contentions put forward on behalf of the Crown should succeed, and the most material of those contentions was that the above-named case dealt only with manual workers and gave no decision affecting clerks, and that Mr. Hall holds an office or employment of profit within the meaning of the schedule. The Solicitor-General expressly accepted the authority of that case, which, indeed, has been unquestioned for nearly sixty years. What, then, does it decide? No doubt it is true that the issue raised related only to persons engaged at weekly wages. The railway company was at the time willing to be assessed as regards such of their officers, clerks and servants as were engaged at annual salaries, and the question for the Court was only whether they were liable to be assessed under Sch. E in respect of their officers, clerks or servants, who were engaged at weekly wages, as well as in respect of those engaged at annual salaries. The decision of the Court, however, was not that the railway company was liable to be assessed on clerks as such, or on all employees not engaged in manual labour. The submission to be assessed in respect of clerks bound nobody but the company in question, and it decides nothing. What the Court decided was expressed in the words of Martin B.: "We think Schedule (E.) extends only to offices or employment under corporations which are of a public nature, and not to workmen or artizans, like engine-drivers, porters and labourers." My Lords, I think the Commissioners were wrong in law in the view they took of this decision. Its real significance is that Sch. E, in spite of its almost unlimited form of expression and of the mention in it of wages and employment, really is limited and that

(1) 2 H. & C. 792.

manual wage-earners at any rate fall outside its lower limit. Others, though not workmen or artizans, may do so, too. The case says nothing to the contrary. The area of the schedule is stated to be confined to offices or employments under corporations which are of a public nature, and the reason given for the exclusion of manual workers is not the character of their work or the mode of calculating their remuneration, but the fact that "they hold no public office whatever." Where a decision, which limits the right of the Crown, has long been unquestioned, far more practical weight attaches to this consideration of lapse of time than would have been the case had the decision been the other way. In these contests the subject is always at a great disadvantage. Decisions in favour of the Crown may often go unchallenged not because their correctness is generally recognized, but because no private person can face the cost of disputing them. Decisions to the contrary effect stand in a very different position. The Crown is always very ably advised, in revenue as in other matters, and for an appeal against a doubtful ruling affecting income tax the funds can always be found. Personally, I think the judgment of Martin B. was right, but it has stood so long that I should adopt it in any case without further remark and should do so not merely in the view of it accepted by Mr. Solicitor, but in the wider and, as I read it, the correct view, which I have above expressed.

Various tests have been suggested by which to determine the application of Sch. E to particular cases, and they may be shortly examined. The Act of 1860 involves that some offices under a railway company are, or may be, public. One can understand this of a general or a traffic manager, of a locomotive superintendent, a secretary or a whole-time solicitor, of the station-masters of sundry great stations, or the managers of sundry terminal hotels. Mr. Hall, however, is in no sense a public character nor does he hold any office at all. He merely sits in one. I think we can infer enough as to his work to be able to say truly that it is scarcely less manual than an engine driver's, though it is less laborious, and that certainly it is not much more mental.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Sumner.

His responsibility is incomparably less ; the call on his moral and intellectual faculties can hardly be greater. It is true that he is said to be on the permanent staff, but an engine driver is not a person who is here to-day and gone to-morrow, except in the course of his employment, and, if liability to a month's notice is consistent with permanency, so may be the obligation to accept one of a week. It is not found as a fact that there is any continuity about the particular place that Mr. Hall fills. I can understand that there is some continuity in the case of the station-master of a particular station or the signalman in a particular box, for some one must always be available to do the work of that place, though I am far from saying that signalmen or station-masters are therefore within Sch. E, but, for anything that appears in the case, Mr. Hall is simply one of a general reserve of clerical workers. He has to go where he is told, and is a unit in a staff, which may expand or contract at need, for anything we know to the contrary. The Commissioners, relying on an erroneous view of the *Lancashire and Yorkshire Case* (1), have not found these facts.

Attention is drawn to the point that Mr. Hall is engaged at what is styled an annual "salary," though he actually gets his money fortnightly. I cannot see the importance in this connection of the mere name given to his remuneration, or of its description and computation by the year rather than by any shorter period of time. There is more to be said for the distinction, that what Mr. Hall receives is a salary, while the persons excluded from Sch. E in the Lancashire and Yorkshire case were paid wages. It is, however, a purely arbitrary distinction and so indefinite as to be really accidental. For economic purposes it is convenient to treat wage-earners as a class, and for political purposes the receipt of a salary is often supposed to involve a different point of view from that which attaches to the earning of wages, but the first term really refers more to the nature and conditions of the manual work done than to the remuneration paid for it, and the second denotes social aspirations rather than any

(1) 2 H. & C. 792.

revenue category. Fashions change fast in this matter, and many a man or woman, who took wages without objection thirty years ago, receives a salary now of no greater amount than the same service would command under the old name. Again, it is said that for the purpose of an annual assessment, an annual salary is, and weekly wages are not, the appropriate sums to be dealt with under it. This depends not on the time unit but on the assumed permanence or fluctuations of the sums paid from time to time within the period of assessment. An income earned at piece rates or varying with the amount of overtime is, no doubt, less susceptible of accurate annual assessment than a salary, which is changed, if at all, only once a year, but the problem is only one of estimating in advance with subsequent adjustment. From the departmental point of view I should have thought that such receipts are just the income, which is the more difficult to assess and adjust and which therefore should, if possible, be collected through the employer. At any rate, a salary of so much a year would be much less difficult to assess and collect under Sch. D than the other. Nor is the language of Sch. D of any real assistance. It is suggested that, as D catches employments not within E, and as those employments, so caught, are spoken of as extending to every employment by retainer in any character whatever even though annual, the consequence must be that any employment not by retainer must fall within E. I doubt if this is so, but, if it is, I think that Mr. Hall's employment is by retainer though annual, for he is not engaged to do a definite thing, to get it done in his own time and in his own way, but to do things of a definite class, as and when he is required, being paid whether his efforts are always required or not. I do not doubt that the appellants keep him pretty fully occupied, but, if work were slack and for a day or two he had little or nothing to do, his salary would run on and he would be entitled to his remuneration, because he would be retained to do the work required. In my opinion his situation is not an office or an employment of profit, and no one would think of calling it so; it enjoys neither publicity nor continuity;

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Sumner.

and it is not distinguishable from that of the engine driver in any respect that falls within the meaning of Sch. E. I think the Commissioners decided on a wrong view of the law and not merely as a question of fact, and that the appeal should be allowed. I will only add that I regret this decision, for it will, I fear, lead to persons escaping tax which they ought to pay, because they cannot be traced by the Inland Revenue officials, or can be got at only at a disproportionate expense; but it is our duty only to interpret these Acts and not to amend them, much as we may recognize that they stand in need of amendment.

LORD WRENBURY. My Lords, there is in this case much that is difficult, but one thing seems to me quite plain, and that is, that the question here is not, as the Court of Appeal thought, a question of fact. It was for the Special Commissioners to find and state all the facts respecting the nature of the office or employment as to which the question arises. It was not for the Court to question those facts in any way. But the question for the Court was whether, upon those facts, Mr. Hall held an office or employment of profit *within the meaning of the Act.* That is a question of law. What does the Act mean? What is the true construction? It is impossible to escape deciding that question of law by saying that the Act is so slovenly and so unintelligible that it is impossible satisfactorily to ascertain and declare its meaning. If it were competent to a Court of Law to censure the Legislature, or if any useful purpose could be served by censuring the Legislatures of 1842 or 1853, no censure could be too strong, I think, for having expressed an Act, and that a taxing Act, in language so involved, so slovenly and so unintelligible as is the language of the Acts of 1842 and 1853. But there it is. A Court cannot say it means nothing and cannot be construed at all. The Court must as best it can arrive at some meaning of the language which bears upon the particular case before it for decision, although it may be, as I think it is, impossible to declare in general terms the true meaning so as to guide and control in the future a decision

upon other facts. As a member of the Joint Committee of both Houses to which was referred the Consolidation Bill which is now the Income Tax Act, 1918, I strove to find some way in which we could deal with the language of confusion and unintelligibility of the Acts to be consolidated. It was, however, impossible to do so. The Committee had only to consolidate, and could not substitute plain words to express a plain meaning without going beyond the limits of consolidation. The Act of 1918 therefore reproduces the old language with all its faults, and has done little more than improve matters a little by some rearrangement. If Parliament had the time, which it has not, the law of income tax, which now so vitally affects the subjects of the realm, ought as speedily as possible to be expressed in a new statute which should bear and express an intelligible meaning.

There is a second point upon which I hold a clear opinion. In my judgment the third rule of Sch. E of 1842 is to be so read as that the whole of it shall be taken as controlled by the word "public." What "public" means is another matter. I hold that the third rule is to be read as if the word "public" were throughout repeated. My reasons for that opinion are as follows. The rule opens with the words "public offices and employments of profit of the description hereinafter mentioned (videlicet)" and concludes with the words "and every other public office or employment of profit of a public nature." Between this beginning and this conclusion are enumerated five groups of words. In the second group the word "public" is introduced before the word "offices." In the first, third, fourth and fifth it is not. In the second, where the word "public" is introduced there are enumerated several offices which certainly are public offices, and it may well be that all of them may be correctly so described, so that the word "public" would seem to be superfluous. In the first, where again the offices are public in their nature, the word "public" is not used. This seems to me to be mere slovenly expression and to indicate that whether the word "public" is in or out makes no difference in the character of the "public offices and employments of profit

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Wrenbury.

of the description hereinafter mentioned" referred to in the initial words. The fifth includes any office or employment of profit in any county or in any city or in any place. Such words cover and include any and every office or employment of profit whatsoever, and unless the word "public" be supplied they fail to define in any way whatsoever the office or employment which is to fall within Sch. E. The initial words which I have quoted indicate that all those which are "hereinafter mentioned" are "public offices and employments of profit." The concluding words by the words "other public office or employment of profit of a public nature" indicate that all that precede are of that character. It is to be noted that a "public nature" is here attached to the employment of profit. The Solicitor-General accepted the view that the adjective "public" in the phrase "public offices and employments of profit" qualifies not the word "offices" only, but the words "employments of profit" also, a view that is strengthened by the fact that the concluding words are "employment of profit of a public nature." Having regard to those concluding words which I have cited, he could scarcely do otherwise. He is driven then to say that the words following the word "videlicet" are some of them not called "public," and are not "public," and that the initial words mean "public offices hereinafter mentioned, videlicet," certain offices which are not public. This does not commend itself to my judgment. Further, the Rules of which r. 3 is one are Rules for dealing with that which is enacted in s. 1 of the Act of 1842 and s. 2 of the Act of 1853. The words are for all material purposes the same in both Acts. The words in s. 2 of the Act of 1853 are as follows: "For and in respect of every public office or employment of profit and upon every annuity, pension or stipend payable by Her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said Schedule (C.) and to be charged for every twenty shillings of the annual amount thereof." These duties are by s. 5 of 1853 to be assessed under the regulations of 1842. The regulations therefore are regulations as to the assessment

of duty upon "every public office or employment of profit." And if "public" is to be read as qualifying both an office and an employment, there is no ground whatever for saying that "public" is not to be read throughout the third rule.

Having said so much as to the construction of the Act, I pass on to inquire whether Mr. Hall's office or employment was public or of a public nature. Since the year 1899 he has held one and the same office or employment throughout. He has risen in that employment, and is now a fourth class clerk. But his office or employment has throughout been the same, and if his office or employment was public in the year ending April 5, 1918, it must have borne that character when, in February, 1899, he was a "lad clerk," and in 1901 became a "clerk" in the service of the Great Western Railway. His pay or salary, if it is to be called a salary, has been raised from time to time, and during the year in question was 130*l.* per annum plus a war bonus of 45*l.* To say that such a servant holds a public office or an employment of profit of a public nature seems to me absurd. Having regard to s. 6 of the Income Tax Act, 1860, it is plain that a railway company may employ persons in such manner as that they hold offices or employments of profit falling within Sch. E, and therefore (as I hold) public or of a public nature. I do not attempt to say what they are. But I do say that this clerk is not among them. In some future case it may be necessary to inquire whether that which is contemplated is not an office permanent in its nature to which upon the occasion of a vacancy a successor must be or naturally would be appointed, whether some status of dignity or responsibility is not to be looked for, whether in some definite manner public duty or public position is not contemplated. This may well be the case. It carries me no further than saying that each case must be determined on its facts, and in every case the question will be whether upon the facts the office or employment is public within the meaning of the Act.

We were pressed with authorities. In *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (1) it was held that engine

(1) 2 H. & C. 792; 33 L. J. (Ex.) 163.

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER. Lord Wrenbury.

drivers, porters, and the like did not come within Sch. E. I think this was right, and if they are outside Sch. E I do not see any ground upon which a fourth-class clerk in a district superintendent's office at Swindon is within it. A man's employment does not become any more "public" because it is sedentary or clerical and not physical or manual. As between an engine driver and a fourth-class clerk, the former certainly owes more duties to the public, whose lives he, in fact, has in his hands, than does the clerk who sits in an office and casts up accounts or conducts correspondence or checks returns. If the test were whether the man owes duties to the public, the clerk can only in a very remote sense—a sense in which every one owes duties to the public—be said to do so. It would, however, be more accurate, perhaps, to apply the test whether he is employed by the public than the test whether he owes duties to the public. But this again finds no firm ground. For a railway company is not the public, and yet under the Act of 1860 a servant of a railway company may hold a public office. Some other test must be found. In *Berry* v. *Farrow* (1), where the man was managing director of an insignificant limited company to which he had assigned a patent but which, in fact, had done no business, Bankes J. expressed the opinion that he was rightly assessed under Sch. E. No reasons are given. *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (2) was not cited, and whether the point had been taken or argued does not appear, and it would seem not to have arisen for decision. If it did arise, and if it was decided, I think the decision was wrong. *Tennant* v. *Smith* (3) demands more attention. It was a case in this House. The man was a bank manager. He was bound, as part of his duty, to occupy the bank house as custodian of the premises. He occupied it rent free. The question was whether in estimating his income for income tax the yearly value of the house was to be taken into account. The decision was that it was not. In opening the case Sir Horace Davey said that for the purpose

(1) [1914] 1 K. B. 632. (2) 2 H. & C. 792; 33 L. J. (Ex.) 163.
(3) [1892] A. C. 150.

of his case it was of no importance whether the assessment was under Sch. D or Sch. E. The respondent argued that it fell under Sch. D. There were sitting six noble and learned Lords. Two of them, Lord Halsbury and Lord Watson, expressed the opinion that the assessment fell under Sch. E. From Lord Macnaghten's judgment at p. 163 I gather that he certainly expressed no opinion that it was Sch. E, but on the contrary thought that it was not relevant for the decision whether it was D or E. Lord Morris and Lord Field say nothing about the point. Lord Hannen (on p. 165 at foot) seems to have thought, as did Lord Macnaghten, that it was irrelevant to the decision whether it was D or E. My Lords, under these circumstances *Tennant* v. *Smith* is no decision of your Lordships' House binding upon your Lordships upon the question now for decision.

My Lords, under these circumstances I hold myself free to follow my own judgment as to the true construction of the Act. I go no further than to say that I have to inquire whether upon its true construction Mr. Hall held a public office or employment of profit of a public nature, and while I do not attempt to define what office or employment would satisfy those requirements, I hold that Mr. Hall's office or employment does not. For these reasons, I think that this appeal must be allowed.

LORD CARSON. My Lords, I concur in the conclusion that this appeal should be allowed. I only desire to add that I associate myself with the observations of my noble and learned friend, Lord Atkinson, as regards the form in which their findings and conclusions have been stated by the Commissioners. It is very desirable in the interests of the subject that questions of law and fact and the decisions upon them should be kept separate and clearly distinguished in the case stated.

Order of the Court of Appeal reversed, and appeal allowed: The respondent to pay the costs in the Courts below and also the costs of

H. L. (E.) 1922 GREAT WESTERN RY. CO. v. BATER.

the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 13, 1922.

Solicitor for the appellants: *A. G. Hubbard.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *March* 16. HANSSON . . . . . APPELLANT;

AND

HAMEL AND HORLEY, LIMITED . . RESPONDENTS.

Sale of Goods—C.i.f. Contract—Tender of Documents—Through Bill of Lading —Sufficiency.

A Swedish merchant agreed to sell to an English company a quantity of guano in bags c.i.f. Norway to Kobe or Yokohama, terms net cash against documents in London; time of shipping as to the first instalment March/April, 1920. The seller, in anticipation of his obligations under the contract, agreed with L., the agent at Hamburg of a Japanese company, which ran a line of steamers from Hamburg to Japan but ran no steamers from Norway, for the conveyance of the guano from Hamburg to Japan on the terms that L. should sign through bills of lading as soon as the goods were in his possession. Between April 20 and 22 the guano was shipped by the sellers in several lots from various Norwegian ports, including B., on the steamship *K.* to Hamburg. On the arrival of the goods at Hamburg L. signed several documents in identical terms called through bills of lading bearing date May 5. The bill of lading relating to the B. consignment stated that the goods were shipped in apparent good order and condition on board the *K.* lying at B. and bound for Hamburg, for transhipment into the Japanese company's steamer *A.*, to be delivered in the like good order and condition at the port of Yokohama unto "order," and the margin contained the statement: "Shipped from B. according to bill of lading on the 22nd April, 1920." On May 12 the seller tendered to the buyers documents relating to the first instalment, including the ocean bills of lading, but the buyers rejected the documents and refused to take up the goods. In an action for the price of the goods:—

Held, first, that the ocean bills of lading were not through bills of

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* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, and LORD CARSON.

lading, inasmuch as they afforded no protection to the buyers on the initial voyage, and did not satisfy the conditions of the contract; secondly, that on a sale on c.i.f. terms the contract of affreightment must be procured on shipment, and that a bill of lading issued thirteen days after the original shipment at another port in another country was not procured on shipment.

Held therefore that the action failed.

Landauer & Co. v. *Craven & Speeding Brothers* [1912] 2 K. B. 94 explained and followed.

Cox, McEuen & Co. v. *Malcolm & Co.* [1912] 2 K. B. 107n. distinguished.

The meaning of "On shipment" explained.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Bailhache J.

The appellant was a merchant of Gothenburg dealing in Norwegian fish guano. The respondents were merchants of London.

By two contracts dated respectively February 9 and 14, 1920, the appellant agreed to sell to the respondents 600 and 350 tons respectively of cod guano net c.i.f. Norway to Kobe or Yokohama at prices therein named, terms of payment net cash against documents in London. Time of shipment March/April as to 300 tons of the said 600 tons and as to the whole of the 350 tons. Subsequently the March/April shipment was by mutual consent reduced to 565 tons in all upon the two contracts.

The question raised by the appeal was whether certain documents called through bills of lading tendered by the appellant were such documents as the respondents were bound to accept as being in compliance with the contracts.

On February 17 the appellant, in anticipation of his duties as a c.i.f. seller, proposed to E. T. Lind, the agent in Hamburg of a Japanese steamship company called the Osaka Shosen Kaisha, which ran a line of steamers from Hamburg to Japan but which ran no ships from Norwegian ports, to book with Lind 1200/1400 tons of fish guano in bags for conveyance from Hamburg to Japan at the rate of 80*s.* per ton—100/300 tons by the steamer in March, 500/600 tons by the steamer in April, and 400/500 tons on the steamer in May, with the right, in case any lot should arrive too late for the scheduled

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD.

steamer, to ship it by the next steamer—the bills of lading to be signed in Hamburg on the presentation of the local bills of lading.

By his reply of February 23 Lind altered the proposed contract in certain respects and in particular as follows: "I will sign the *through Bs/L.* as soon as the goods are in my possession. . . . . I hope to be able to send you Bs/L. of the same wording as previously used by the Hamburg-America line. In such a case the place of shipment would appear in the Bs/L."

On February 27 the appellant accepted the proposed alterations. The existence of this contract was not known to the respondents until after action brought.

The appellant himself arranged for the carriage of the goods from Norway to Hamburg and five parcels of guano were in fact shipped on various dates between April 20 and 22 from various ports on the West Coast of Norway on the Norwegian steamer *Kiev* under local bills of lading.

On the arrival of the goods at Hamburg Lind, in pursuance of the contract above stated, signed five documents bearing date May 5, purporting to be through bills of lading relating to the said five parcels. All these documents were in every material respect identical and the bill of lading relating to the goods shipped at Braatvag may be taken as a specimen. This document, which was headed "Through Bill of Lading," stated as follows: "Shipped in apparent good order and condition by Messrs. Hamel & Horley, Ltd., on board the steamship 'Kiev' lying in or off the port of Braatvag and bound to Hamburg for transhipment into the Osaka Shosen Kaisha's Steamship 'Atlas Maru' . . . . (1500) One thousand and five hundred bags Cod guano being marked and numbered as per margin, and to be delivered . . . . in the like good order and condition at the port of Yokohama or as near thereto as the ship may safely get unto 'Order' . . . . " The margin contained the statement: "From Braatvag to Yokohama. Osaka Shosen Kaisha." Then followed the name and address of the agent and a statement of the number and weight of the bags with the marks and numbers thereon, and then:

"Shipped from Braatvag according to Bill of Lading on the 22nd April, 1920."

On May 12 the appellant tendered to the respondents a series of documents in respect of the said 565 tons, including these "through" bills of lading. No other bill of lading or contract of affreightment was ever tendered to the respondents. The respondents rejected the documents and refused to take up the goods. Thereupon the appellant brought an action against the respondents for the price of the goods. Subsequently by arrangement the respondents took up the shipping documents relating to the bulk of the goods and the claim was ultimately reduced to 4683*l.* 2*s.* 11*d.*

The action was transferred to the Commercial Court. The appellant by his points of claim, after referring to the contracts for sale and to the shipment of the five parcels of guano from the Norwegian ports, alleged that he procured to be issued at Hamburg on May 5, 1920, by the Osaka Shosen Kaisha Steamship Company, the owners of the steamship *Atlas Maru*, five through bills of lading relating to the said five parcels respectively covering the whole voyage from the Norwegian ports to Kobe or Yokohama, showing on the face thereof, as the fact was, that the goods were shipped from Norway within the contract period on board the steamship *Kiev* for transhipment into the steamship *Atlas Maru*; and that the shipments under through bills of lading as aforesaid were made in accordance with the universal custom obtaining in Norway and well known to the respondents when goods were sold c.i.f. Japan or the East, and in accordance with the course of dealing between the parties in previous transactions of the same kind.

The respondents by their amended points of defence alleged (inter alia) that the bills of lading tendered were not such through bills of lading as were regular and valid tender under the contracts, and they denied the alleged custom and its validity and the alleged course of business.

The evidence as to the alleged custom is sufficiently dealt with by Lord Sumner in his judgment.

Bailhache J. held that the through bills of lading by

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD.

which the Japanese company took upon themselves liability for the whole voyage were properly tendered and complied with the contractual obligations of the seller, and he gave judgment for the appellant for the amount claimed.

This judgment was reversed by the Court of Appeal (Bankes, Warrington, and Atkin L.JJ.). The Lords Justices held that the so-called through bills of lading (if through bills of lading at all), coming into existence as they did after the completion of the voyage from Norway to Hamburg, were too late in point of time and were not a sufficient tender.

1922. Feb. 10, 13. *Leck K.C.* and *N. L. Macaskie* for the appellant. Two questions arise upon this appeal. 1. Is this bill of lading a document which the respondents as buyers under a c.f. and i. contract were bound to accept? 2. Was it delivered in time? This bill of lading is a through bill of lading by which the ocean-going company accept the whole responsibility for the goods from the time of their shipment in Norway. Where goods are shipped from Norway to the Far East it is the course of business for the goods to be carried by a local steamer to a port of transhipment, usually Hamburg, and, in cases where the ocean-going steamer has no agents at the original port of shipment, for a through bill of lading to be issued at the port of transhipment.

There is no distinction in principle between issuing a through bill of lading at the original port of shipment covering a voyage for part of which the ocean-going steamer does not carry the goods and issuing a through bill of lading at the port of transhipment. In *Landauer & Co.* v. *Craven & Speeding Brothers* (1), where Scrutton J., distinguishing *Cox, McEuen & Co.* v. *Malcolm & Co.* (2), held that the tender of the bill of lading was bad, there was no through bill of lading at all. It is objected that the contract of affreightment must have come into existence in a transferable form at the time of shipment, but that is putting a new burden on a c.i.f. seller. Until the judgments of the Court of Appeal in the present case it has never been held that the documents must be

(1) [1912] 2 K. B. 94. (2) [1912] 2 K. B. 107n.

brought into existence at the actual time of shipment—in the absence of an express condition as to the date of the bills of lading, such as existed in *In re General Trading Co. and Van Stolk's Commissiehandel* (1)—provided that they are tendered within a reasonable time, and in considering what is reasonable the circumstances of each case are to be considered: *Sanders Bros.* v. *Maclean & Co.* (2); and see *Johnson* v. *Taylor & Co.* (3) In the circumstances the tender of bills of lading some ten days after the contract time was not too late. Having regard to the course of business in voyages of this kind the appellant has done what is mercantilely reasonable in procuring the through bills of lading at the port of transhipment.

R. A. Wright K.C. and *Henry O'Hagan* for the respondents. Under a c.i.f. contract the seller can only fulfil his obligations at the port of shipment, and the shipment must be evidenced by proper documents. Therefore the Court of Appeal were right in adopting the principles laid down by Scrutton J. in *Landauer & Co.* v. *Craven & Speeding Brothers.* (4) A c.i.f. contract is a sale of properly documented goods. Therefore the seller has not fulfilled his obligation. It is as much a part of the contract that the goods should be shipped under a proper contract of affreightment as that the goods should answer the contract description. Here ex concessis there is no contract of affreightment from Braatvag to Yokohama. There was no through contract of affreightment on shipment and Lind refused to assume responsibility until he got possession of the goods. Then as to the form of the document, this is not a usual or proper form of contract of affreightment for a through shipment from Braatvag to Yokohama. The document bears on its face that the goods have been shipped under a different bill of lading from Braatvag to Hamburg. This document could not be relied on by the respondents as giving them a right against the Japanese company during the whole voyage from Braatvag to Yokohama. It is on its face not effective as regards the initial voyage. During that

(1) (1911) 16 Com. Cas. 95.
(2) (1883) 11 Q. B. D. 327, 337.
(3) [1920] A. C. 144, 155, 156.
(4) [1912] 2 K. B. 94.

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD.

period the goods were uncovered, and the seller never had a through contract of affreightment. As to the alleged practice to issue through bills of lading at the port of transhipment, that practice, if it exists, is confined to a case where through bills of lading are issued on receipt of the local bills of lading, but that arrangement was negatived by Lind. Having regard to the marginal reference to the local bill of lading, this document in no way binds the Japanese company except for the voyage from Hamburg.

Leck K.C. replied.

The House took time for consideration.

1922. March 16. LORD BUCKMASTER. My Lords, I have had an opportunity of reading and considering the opinion that has been prepared and put in print by my noble and learned friend, Lord Sumner. I desire only to express my entire agreement with its contents.

LORD ATKINSON. I also have had that advantage, my Lords, and I concur.

LORD SUMNER. My Lords, the only question argued on this appeal was whether the respondents were right in refusing to take up and pay for certain shipping documents tendered to them, on the appellant's behalf, by his bankers in London. The bill of lading was the actual document in dispute. Why the respondents really refused the documents does not matter, nor does the case turn on the particular objection put forward by them at the time.

It was common ground that the whole transaction is governed by English law. The cargo—cod guano in bags—was sold c.f. and i., Kobe or Yokohama, to be shipped from Norway, the first instalment March/April, and the balance May/June. There was no stipulation as to the months within which the bill of lading itself must be dated, or as to the date of the bill of lading being conclusive evidence of the date of the shipment. The bags in question were shipped at Braatvag in Norway. A direct steamer to Japan was not

available from Braatvag, nor do I imagine that the buyers supposed that it would be, and the seller shipped the consignment at Braatvag on board the *Kiev*, a steamer belonging to a Norwegian company, to be carried to Hamburg, where it was to be transhipped into the Osaka Shosen Kaisha's steamship *Atlas Maru* for Yokohama. The appellant had made a contract, partly expressed in a "Freight Contract" and partly in correspondence, with a Mr. Lind, of Hamburg, the representative of the Osaka Shosen Kaisha, for the conveyance of the cod guano from Hamburg to Japan on the terms, among others, that bills of lading to Japan should be signed in Hamburg on presentation of the local bill of lading—that is, the bill of lading for carriage by the *Kiev*—as soon as the goods were in Mr. Lind's possession, being there either taken over in lighters on the appellant's behalf or direct into the steamer for Japan. If they arrived in Hamburg too late for the steamer scheduled, the appellant reserved to himself the right to ship them by the next steamer of the line.

The first, or local, bill of lading was signed on behalf of the master of the *Kiev* on April 22, 1920, and acknowledged receipt of the cod guano from the appellant, to be delivered to "order Yokohama," the *Kiev* being bound for Hamburg, with the right to tranship and send on the goods by another steamer, freight prepaid to Hamburg, the *Kiev's* destination.

At Hamburg there was issued to the appellant an ocean bill of lading, signed by Mr. Lind on behalf of the captain of the *Atlas Maru* and dated May 5, 1920. The respondents were named in it as the shippers in accordance with a stipulation they had made, and the cod guano was made deliverable to order at Yokohama. The case is another instance, like the *Parana* (1), of transactions in which, in spite of the insertion of the consignee's name in the bill of lading, the intention to reserve the jus disponendi to the seller till the documents are taken up is manifested by the way in which the transaction is carried through with regard to the presentation of the documents. The respondents being

(1) [1921] 1 A. C. 486, 515.

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD. Lord Sumner.

named as the shippers, no question arises of any estoppel as against the carriers in favour of persons taking the bill of lading by endorsement and on the faith of the statements recited in it. The document was headed: "Through Bill of Lading," and it contained in the margin these statements: "from Braatvag to Yokohama" and "shipped from Braatvag according to bill of lading on the 22nd April, 1920," and it began thus: "Shipped in apparent good order and condition by Messrs. Hamel and Horley, Ltd., on board the steamship 'Kiev,' lying in or off the port of Braatvag and bound to Hamburg for transhipment into the Osaka Shosen Kaisha's Steamship 'Atlas Maru' . . . . (1500) One thousand and five hundred bags cod guano . . . . to be delivered . . . . at the port of Yokohama . . . . unto 'order.'"

This bill of lading accordingly was itself dated after the contract time of shipment—March/April, but it stated in the margin, and truly so, that, according to a bill of lading (that is, the local one), shipment at Braatvag was within the contract time. It stated further that the goods, when shipped in the *Kiev*, were in apparent good order and condition, but it was silent as to their condition at Hamburg. There was no express statement that any goods had been shipped in the *Atlas Maru* at all, or, if so, in what order and condition they were when shipped, and it was reasonably plain that the *Kiev* did not belong to the Japanese owners of the *Atlas Maru*. The undertaking to deliver in Japan would, in the absence of special authority to those signing the bill of lading, apply only to such cargo as might, in fact, have been shipped at Hamburg on board the *Atlas Maru*, and no one would assume, without actual evidence of it, that a person like Mr. Lind, signing on behalf of the captain of the *Atlas Maru*, had any authority to bind her owners for the carriage by the *Kiev* or the owners of the *Kiev* for anything at all. The question is whether this ocean bill of lading was a good tender under the contract of sale and whether the respondents were bound to take it up and pay for the consignment.

A c.f. and i. seller, as has often been pointed out, has to cover the buyer by procuring and tendering documents

which will be available for his protection from shipment to destination, and I think that this ocean bill of lading afforded the buyer no protection in regard to the interval of thirteen days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg. The initial words, on which the matter depends, may be put as a mere recital of a fact, or as words of contract, and in the latter case the contract may be that the owners of the *Atlas Maru* will (1.) be answerable for the safe carriage of the goods from Braatvag to Hamburg, though they have not actually carried them, subject always to the perils excepted in their own bill of lading, though these do not correspond with the exceptions in the *Kiev* bill of lading, or (2.) will make good any loss or damage to the goods during the transit from Braatvag to Hamburg, if the owners of the *Kiev* fail to do so, or (3.) will indemnify the respondents against loss or damage affecting the goods during that voyage. Unless the words are words of contract to the effect first above mentioned, they are useless to the appellant, and even so the question arises on the face of the document what authority, if any, the captain of the *Atlas Maru* or his agent, Mr. Lind, who signs for him, has to bind his owners by words of promise in respect of a voyage which is already over before he has anything to do with the goods on behalf of the Osaka Company. Prima facie he has none, and there is nothing shown to rebut the presumption. No doubt a question may arise on any bill of lading whether the captain has, in fact, signed for more goods than were put on board, and, if so, whether he has any special authority to do so; but the doubt raised here, if not dissimilar in kind, is different in its actual form and much greater in degree. Of course, no contract by way of indemnity or by way of guarantee or of answering for the default of another will satisfy those requirements of a c.f. and i. sale which involve a contract of affreightment, since different defences are available on them and different incidents attach to them from those applicable to a bill of lading. Still less can a mere recital of facts avail.

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD. Lord Sumner.

My Lords, with all deference to the very weighty opinion of Bailhache J. to the contrary, in my judgment these words are mere words of recital, but, even if they were what the appellant contends that they are, I think it is clear that they do not make the ocean bill of lading a good tender in this case. The bill of lading by the *Kiev* was originally a contract with the appellant himself, and never was, nor in any normal course of business ever would be, tendered to the respondents. As there were not, I suppose, to be two contracts for carriage as far as Hamburg, this is strong to show that the appellant never intended the ocean bill of lading to be a contract of carriage from Braatvag to Hamburg. When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying a litigation, as Lord Trevethin (then A. T. Lawrence J.) says in the *General Trading Co.'s Case*. (1) These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. I am quite sure that, under the circumstances of this case, this ocean bill of lading does not satisfy these conditions. It bears notice of its insufficiency and ambiguity on its face: for, though called a through bill of lading, it is not really so. It is the contract of the subsequent carrier only, without any complementary promises to bind the prior carriers in the through transit. The appellant's contract with Mr. Lind was not transferable by indorsement and delivery, nor was it tendered; the *Kiev* bill of lading he kept to himself, and endorsed to Mr. Lind under his own contract with him. I do not suggest that tender of either document would have carried matters any further, but, as things stood, the buyer was plainly left with a considerable lacuna in the documentary cover to which the contract entitled him.

The point is also put in a slightly different way, which

(1) 16 Com. Cas. 95, 101.

equally relates especially to bills of lading. Scrutton J. points out in *Landauer & Co.* v. *Craven* (1), that in a sale of goods c.f. and i., the contract of affreightment must be procured "on shipment." Of course this is practicable and common even when a through bill of lading is necessary, containing provision for transhipment at an intermediate port from a local to an ocean steamer not in the same ownership. I do not understand this proposition as meaning that the bill of lading would be bad, unless it was signed contemporaneously with the actual placing of the goods on board. "On shipment" is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and, in some cases, after the ship has sailed. I do not think that they thereby necessarily cease to be procured "on shipment," nor do I suppose that the learned judge so intended his words. It may also be that the expression would be satisfied, even though some local carriage on inland waters, or by canal, or in an estuary by barge or otherwise, preceded the shipment on the ocean steamer, provided that the steamer's bill of lading covered that prior carriage by effectual words of contract. "On shipment" is referable both to time and place. In principle, however, and subject to what I have said, I accept this opinion of so great an authority, and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port in another country many hundreds of miles away, is not duly procured "on shipment." Indeed the ocean bill of lading was not procured as part of this c.f. and i. shipment at all, and "on shipment" does not at any rate mean on re-shipment or on transhipment. It is not enough that at the time of the initial shipment the c.f. and i. seller procured a contract by correspondence with Mr. Lind for the forwarding of the goods by an ocean steamer, for that was not procuring a bill of lading. If the *Kiev* had been lost with the cod guano on the coast of Norway, no contract of affreightment to Japan would have been procured or forthcoming at all. The matter was well tested thus in the Court of Appeal. In the absence

(1) [1912] 2 K. B. 94.

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD. Lord Sumner.

of express stipulation, shipping documents under a contract of sale on c.f. and i. terms must be tendered by the seller as soon as possible after shipment: Kennedy L.J. in *Biddell Bros.* v. *Horst Co.* (1) If, then, the port of transhipment was late on in the through voyage, a seller might be entitled to tender the documents long before any through bill of lading to Japan had been signed or procured at all, and when there was no bill of lading in existence except that to the intermediate port. This ocean bill of lading was, therefore, on this ground also, in my opinion, a bad tender.

My Lords, though the document is called a through bill of lading it is not really so, for no one contracted by it for the carriage through from Braatvag to Yokohama. Accordingly, I express no opinion adverse to the sufficiency of through bills of lading, properly so-called, as a tender under a contract like this. I would add that the evidence given to prove a course of business between the contracting parties or a custom of merchants generally affecting the normal requirements of a c.f. and i. contract failed to establish any distinction in this case, and I have no observation to make on the effect of such evidence had it been sufficient. The gist of it, however, was that, although in some cases the Japanese line either appointed an agent at the Norwegian port, or gave authority to the captain of the local steamer to sign a bill of lading on their behalf at and from that port (which would, of course, be a real through bill of lading), in cases where they had no control over the cargo till it reached Hamburg, of which this was an instance, they would sign only at and from Hamburg, and would not issue a through bill of lading, since they were not booking the cargo for the whole journey at a through rate.

An experienced witness called by the appellant further stated that he did not recall any other instance of a through bill of lading dated (that is, signed and dated) at the port of transhipment, and it was admitted by counsel that no such instance could be found in any reported case. Nor was any instance forthcoming of a ship's signing for the carriage of

(1) [1911] 1 K. B. 934, 958.

goods, already carried and delivered by another ship, as a prior part of the entire transit. It was admitted by another of the appellant's witnesses that a through bill of lading ought to be issued at the original port of shipment. Plainly, what the seller ought to have done was either to get Mr. Lind to sign a bill of lading from Braatvag to Yokohama with the right to tranship at Hamburg, if he had authority so to sign, or to have sold c.f. and i. Hamburg for Yokohama, and have forwarded the goods to Hamburg on his own account. I have only to add that, judging by the report in [1912] 2 K. B. 107, the decision in *Cox, McEuen & Co.* v. *Malcolm & Co.* does not touch the present case. Being a decision on a case stated and on questions put by an arbitrator, the issue was limited by his findings and by the terms of his questions. What those terms were is only to be gathered from the judgment, but they plainly did not include the question now in issue—namely, whether a bill of lading signed at and operating from an intermediate port of transhipment is a sufficient document for tender to the buyer under a c.f. and i. sale. The contract was for goods to be shipped from Manila to London by steamers "direct or indirect," and the buyers rejected bills of lading from Hong Kong, partly on the ground that they did not comply with a stipulation as to the date of shipment, and partly because they did not conform to the words "shipment direct or indirect." The arbitrator found as facts that transhipment at Hong Kong was usual, and that through bills of lading from Manila, though usual, were not essential. Evidently he was proceeding on some recognized custom of the trade affecting the meaning of the contract. Accordingly the decision was that the contract did not require a through bill of lading; that the goods were, in fact, shipped to London "indirect," and were shipped at Manila within the contract time. The production of the Hong Kong bill of lading alone did not show that the conditions of the contract were not fulfilled, and the form of the arbitrator's question prevented the buyers from raising the contention that they were entitled to reject the tender because a Hong Kong bill of lading was not one which they were bound to

H. L. (E.) 1922 HANSSON v. HAMEL & HORLEY, LD. Lord Sumner.

take up. On the facts found it was assumed that the Manila bill of lading was not one of the shipping documents which had to be tendered and taken up, since, on a contract to which a through bill of lading was not essential and which was in terms satisfied by indirect shipment, the tender of the Hong Kong bill of lading sufficed. The arguments of counsel on both sides in the case of *Landauer & Co.* v. *Craven* (1) show that *Cox, McEuen & Co.'s Case* (2) was understood not to turn on any question of the shipping documents which are required by c.f. and i. terms in general, and I do not think this case can affect the present appeal. I would suggest to your Lordships that the appeal should be dismissed with costs.

My Lords, my noble and learned friend Lord Wrenbury desires me to add that he concurs in this opinion.

LORD CARSON. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 16, 1922.

Solicitors for the appellant: *Reynolds & Son.*
Solicitors for the respondents: *Donald McMillan & Mott.*

(1) [1912] 2 K. B. 99, 101. (2) [1912] 2 K. B. 107n.

[HOUSE OF LORDS.]

WANKIE COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

H. L. (E.)*
1922
[*March* 17.

Revenue—Excess Profits Duty—Trade or Business—Change of Ownership—Liability of Owner in respect of Profits made by Predecessor—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *s.* 38; *s.* 45, *sub-s.* 2.

Sect. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, provides that a duty known as "the excess profits duty" shall be charged, levied and paid on the amount by which the profits arising from any trade or business to which Part III. of the Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded by more than 200*l.* the pre-war standard of profits; and by sub-s. 2 the accounting period was defined as the period for which the accounts of the trade or business had been made up. By s. 45, sub-s. 2: "The duty may be assessed on any person for the time being owning or carrying on the trade or business . . . . or, where a trade or business has ceased, on the person who owned or carried on the trade or business . . . . immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business . . . . at that date":—

Held (by Lord Buckmaster, Lord Atkinson, and Lord Sumner; Lord Dunedin and Lord Carson dissenting), that the person assessable to excess profits duty under s. 45, sub-s. 2, as being the person for the time being owning or carrying on the trade or business, was the person who owned or carried on the trade or business at the time of assessment and not the person who owned or carried it on during the accounting period in respect of which the assessment was made.

Accordingly, where a company owning a business sold it to a new company as from December 31, 1914, and was in due course wound up, and the new company (which was incorporated on December 28, 1914) was in September, 1916, assessed to excess profits duty in respect of profits made by the old company during two accounting periods, from August 31, 1913, to August 31, 1914, and from August 31, 1914, to December 31, 1914:—

Held (by the same majority), that the assessments to excess profits duty were rightly made upon the new company.

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* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD CARSON.

H. L. (E.)
1922
WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Dictum of Viscount Finlay in *John Smith & Son* v. *Moore* [1921] 2 A. C. 13, 25 disapproved.
Decision of the Court of Appeal [1921] 3 K. B. 344 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J. (2) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The facts are fully set out in the report of the case before the Court of Appeal and may be shortly summarised as follows :—

On September 5, 1916, the appellants were assessed to excess profits duty by the Commissioners of Inland Revenue in respect of the following accounting periods : Accounting period August 31, 1913, to August 31, 1914, net amount of excess profits 22,000*l.*—rate 50 per cent.—duty payable 11,000*l.* Accounting period August 31, 1914, to December 31, 1914, net amount of excess profits 8333*l.*—rate 60 per cent.—duty payable 5000*l.*

The appellant company was incorporated under the Companies Acts on December 28, 1914, with a capital of 410,000*l.* divided into 820,000 shares of 10*s.* each and on January 1, 1915, received the certificate of the Registrar of Companies entitling them to commence business.

By an agreement dated December 30, 1914, the appellant company acquired from another company of the same name as the appellant company and its liquidator all the assets and undertaking of the old company as at December 31, 1914. The consideration for the purchase consisted in the satisfaction by the appellant company of the liabilities of the old company, the issue to the holders of outstanding debentures in the old company of debentures in the new company, and the allotment to the liquidator of the old company or his nominees of shares in the new company to the intent that these shares should be distributed among the members of the old company in the proportion of two fully-paid shares in the new company for each fully-paid share held by them in the old company.

(1) [1921] 3 K. B. 344. (2) [1920] 3 K. B. 287.

The assets were duly distributed by the liquidator of the old company amongst the persons entitled to them. The final meeting of the old company was held on October 14, 1915, and the final return of the old company was filed on October 18, 1915.

The Commissioners for the General Purposes of the Income Tax Acts confirmed the assessments. Rowlatt J. reversed the decision of the Commissioners, but the Court of Appeal by a majority (Lord Sterndale M.R. and Younger L.J.; Atkin L.J. dissenting) reversed his decision and restored the decision of the Commissioners confirming the assessments.

1922. March 2, 3. *Sir John Simon K.C.* and *A. M. Latter* for the appellants. The question relates to the incidence of excess profits duty where there has been a change in the ownership of a business during the period in which the excess profits duty was payable, and it turns upon the construction of the words in s. 45, sub-s. 2: "any person for the time being owning or carrying on the trade or business." In the appellants' submission the person to be assessed is the person who was carrying on the business during the accounting period to which the assessment relates, as was held by Rowlatt J. and Atkin L.J. The majority of the Court of Appeal, on the other hand, have held that the person to be assessed is the person owning and carrying on the business at the time when the assessment to duty was actually made. It cannot have been the intention of the Legislature to call upon one taxpayer to pay the debt of another taxpayer, and if the language is open to an interpretation by which the duty falls on the person who has made the profits that interpretation should be preferred. A further reason for adopting the construction contended for by the appellants is that the Act contains no provision by which the person assessed in respect of profits to which he was never entitled can recover the duty from the person entitled to those profits. Courts of law will hesitate to adopt a construction which makes one person liable for the debt of another without the former receiving any benefit in return for discharging

H. L. (E.) 1922 — WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

that liability: *Cannon Brewery Co.* v. *Gas Light and Coke Co.* (1) And see *Simms* v. *Registrar of Probates* (2); *Drummond* v. *Collins.* (3) Rowlatt J.'s decision in this case is expressly approved by Lord Finlay in *John Smith & Son* v. *Moore* (4), where he rejects the view that the effect of the sub-section is that any owner for the time being may be assessed to excess profits duty although he had nothing to do with the business during the accounting period in which those excess profits were earned. [They also referred to *Gittus* v. *Inland Revenue Commissioners.* (5)]

Reginald Hills (*Sir Gordon Hewart A.-G.* with him) for the respondents. Sect. 45 deals with the act of assessment and the words "for the time being" in sub-s. 2 have reference to the act which is being there dealt with, namely, the act of assessment. There is no warrant in the section for inserting the words "during the accounting period." If the reference is to the accounting period it is impossible to give any meaning to the second limb of the sub-s. 2, which becomes unnecessary. The third limb also is only consistent with the respondents' construction. Looking at the scheme of the Act the business the profits of which are to be taxed is regarded throughout as one continuous business: per Viscount Cave in *John Smith & Co.* v. *Moore.* (6) Even if hardship arises from the construction adopted by the Court of Appeal the terms of the sub-section are too plain to be departed from on that ground. [He also referred to *Holborn Viaduct Land Co.* v. *The Queen.* (7)]

Sir John Simon K.C. replied.

The House took time for consideration.

1922. March 17. LORD BUCKMASTER. My Lords, the Finance (No. 2) Act of 1915 created a new tax called an "Excess Profits Duty" which was to be charged, levied and paid on the amount by which the profits arising from any

(1) [1904] A. C. 331, 338, 339.
(2) [1900] A. C. 323, 335.
(3) [1915] A. C. 1011, 1017.
(4) [1921] 2 A. C. 13, 25.
(5) [1921] 2 A. C. 81, 87.
(6) [1921] 2 A. C. 13, 34.
(7) (1887) 2 Tax. Cas. 228, 235.

trade or business to which the Act applied during a period (described in the Act as an "accounting period") which ended after August 4, 1914, and before July 1, 1915, exceeded by more than 200*l.* the pre-war standard of profits as defined by the statute. The "accounting period" was defined as being the period for which the accounts of the trade or business had been made up. The pre-war standard of profits was defined by s. 40, sub-s. 2, as being "the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer." This is a summary of the relevant provisions of that part of the statute which created and imposed the tax. The important matters to observe are that the tax is to be charged, levied and paid on the profits arising from the trade or business, and that the accounting period might be, as in the present case it was, not merely one period but possibly two, and in certain special and unusual cases it might even be three periods of time. There is but little ambiguity in the terms of this section. The difficulty that arises, and it is a serious one, is in the construction of the section which provides for the assessment of the duty. The facts of the present appeal afford an excellent illustration of how that difficulty is felt.

The appellants are a limited company incorporated on December 28, 1914. This company was, in fact, a reconstruction of an old company which went into liquidation and, having transferred all its assets to the new, was finally dissolved on October 18, 1915. The old company had made profits which were admittedly liable to the tax, and for its determination there were two accounting periods to be considered, the one for the twelve months ending August 31, 1914, and the second for the four months ending December 31, 1914. Assessments were made upon the new company in respect of the excess profits between these dates and no question arises as to the amount so assessed. An appeal was taken by the appellants against the assessments to the Commissioners for General Purposes of the Income Tax Acts on the ground that they were not liable for the tax, and the

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Lord Buckmaster.

Commissioners made an award in the form of a special case confirming the assessments. This award was reversed by Rowlatt J. on appeal, and his decision was in turn reversed by the Court of Appeal, Atkin L.J. dissenting. From that decision the present appeal has been brought.

The facts as stated show quite clearly that, regarding, as it is right to do, the new company as a perfectly separate and distinct entity from the old, they are being called upon to pay a tax for profits that they did not earn, and it is argued that this amounts to an injustice which the statute could never have contemplated. Arguments based upon the ground of injustice have but little weight in determining the true meaning of an Act of Parliament unless, indeed, its provisions are so ambiguous that the hardship inflicted by one construction can be used to show that such a purpose could not be properly attributed to the Legislature. If the words of the statute can only reasonably bear one meaning, it is not, in my opinion, within the competence of the Courts to consider the fairness or the unfairness of the result that ensues. That is a matter for Parliament and not for His Majesty's judges.

It becomes, therefore, necessary to see whether the section under which this assessment has been made is fairly susceptible of such ambiguity as to give weight and strength to the argument based on the plea of hardship. The section in question is 45, and as each paragraph requires minute examination it is desirable that the whole section should be set out in full. It is as follows: "45.—(1) The excess profits duty shall be assessed by the Commissioners of Inland Revenue, and shall be payable at any time, not being less than two months, after it is assessed. The Commissioners may, in any case where they think fit, allow the duty to be paid in instalments of such amount payable at such times as the Commissioners direct. (2) The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade

or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date."

It is plain from reading these words that the decision depends upon attributing the correct meaning to the phrase "any person for the time being owning or carrying on the trade or business." It is contended on behalf of the appellants that these words mean the person carrying on the trade or business at the end of any accounting period, and the fact that there may be more than one accounting period is the explanation of the general and rather elastic phrase "for the time being." I am unable to see that the words bear such construction. The section begins by the provision as to assessment, and in its ordinary meaning "the person for the time being" would, in my opinion, be the person who, at the time of the assessment, carried on the trade or business. There is no reference to the accounting period, and, were it desired to define the person at the end of the accounting period as the person to pay, simple words could have effected that purpose. It is, of course, equally true that the words "at the date of assessment" might have been used, and did the matter remain simply on the opening phrase, the argument as to the unfairness of making "A" pay for the profits earned by "B," when there might be no provision enabling indemnity to be obtained by the new owner from the old for a liability unforeseen and unascertainable, would be relevant. But it is the subsequent words of the sub-section that to my mind place the matter beyond doubt. The trade or business must be regarded as the continuing entity of the enterprise, independent of the change of ownership, and the next provision is alternative to the assessment of the person for the time being. It is impossible to torture the

H. L. (E.) 1922 WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS. Lord Buckmaster.

English language so as to make the word " or " in this statute equivalent to " that is to say " or " by way of example." But if it be a true alternative the following words dispose of the appellants' case, for they provide that where a trade or business has ceased the person who carried on the trade immediately before it ceased is the person to be taxed. If, however, the trade or business ceased the accounts would naturally be made up to the date when it ceased and this would be the end of the accounting period, so that on the assumption that " the person for the time being " meant the person then owning the business, this subsequent clause could have no effect except by way of exposition of a particular instance. I am unable to see how such an exposition of doubtful words can be properly introduced by the word " or." The clause must mean that in the special instance instead of " the person for the time being " another person is to be taken, and the provision becomes essential if the phrase " for the time being " means " at the date of assessment," for if the business had ceased before the assessment were made there would then be no person from whom the duty could be obtained.

The final provision points to the same conclusion : where the business has changed, the accounting period may be taken up to the moment when the change took place, and, once more, if the person for the time being were the then owner, there was no need for further words ; but again, the statute declares that in that event the duty can be assessed on the person then owning the trade. These considerations lead me, my Lords, to the only conclusion that I can form in this matter, which is that the Legislature has deliberately designed to make the person at the time of assessment the person responsible for payment of the duty. The fact that the clause places in the hands of the Commissioners a discretion as to the person they may select for payment does not appear to me to have great weight, for on any construction a discretion is given them, and that in one view the exercise of that discretion might have more serious consequences than in another, does not seem to me sufficient to change the meaning of the words.

It is admitted that this matter has never previously arisen for decision before your Lordships' House, but reliance is placed upon the statement made by Lord Finlay in the case of *Smith & Son* v. *Moore*. (1) That statement is as follows :— "For a long time the main stress of the argument for the Crown was rested upon s. 45, sub-s. 2, of the Excess Profits Duty Act. It was contended that the effect of this enactment is that any owner for the time being of a business may be assessed to the excess profits duty although he had nothing to do with the business during the accounting period in which these excess profits were earned. It was insisted that this showed that the taxation was imposed upon the business and not upon the owner. I cannot so read the clause. The excess profits duty is charged not on the business but on the person who carried it on in the relevant accounting period. I cannot consider s. 45, sub-s. 2, as empowering the Commissioners to assess to the duty a person who had no interest in the business during the accounting period in respect of which the assessment is made. The last words of the subsection providing for a change of ownership are meant to meet the case of a change of ownership in the course of an accounting period, and in such a case to enable the Crown to take the accounting period as ending at the date of the change and assess the duty on the person who carried on the business at that date. I agree with the view which is expressed by Rowlatt J. as to the meaning and effect of this clause (s. 45, sub-s. 2) in the case of *Wankie Colliery Co.* v. *Inland Revenue Commissioners*. (2) The clause is not mentioned in any of the judgments in the Court of Session and appears to me to have been very properly left out from the pages in the appendix, on which are printed the sections which are relevant to the case."

That question, as is pointed out by Lord Finlay, was really not relevant for the decision of the case, but if it were, it was one with which the other members of your Lordships' House were unable to agree. How far it was the subject of express argument at the time is difficult to say, for it

(1) [1921] 2 A. C. 13, 25. (2) [1920] 3 K. B. 287.

H. L. (E.) 1922 WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

receives no consideration in the opinion of the other members of the House who decided the appeal. Nor does the decision in *Gittus* v. *Inland Revenue Commissioners* (1) assist in the determination of the present controversy, for the point that there arose for decision was remote from the present issue.

The question raised is not covered nor assisted by any previous decision, and for the reasons I have given I think this appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, the tax denominated "Excess Profits Duty" is imposed by s. 38 of the Finance Act (No. 2), 1915, which is in the following terms: "There shall be charged, levied, and paid on the amount of which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August nineteen hundred and fourteen, and before the first day of July nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits . . . . a duty . . . . of an amount equal to fifty per cent. of that excess."

I emphasize the word "paid." It seems to me a natural inference that unless something is said to the contrary one may expect the assessment to be levied on the person to whom the profits of the accounting period to be paid belong.

Sect. 45 is the assessment section and is in these terms:— "45 (2) The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or

(1) [1921] 2 A. C. 81.

business or acted as agent for the person carrying on the trade or business at that date."

The whole controversy arises as to the proper meaning of the words "person for the time being." It is, I admit, quite possible to read the words as referring to the person owning or carrying on the business at the time when the assessment is made irrespective of whether that person has any lot or concern with the accounting period in respect of which the assessment is made, but I think the expression is equally justified by considering that there may be more accounting periods than one, and that this refers to the striking of an assessment at any one of these periods. If so, the natural meaning will be the person owning or carrying on the business at the relevant period and will be in accordance with what I have called the natural expectation one would have formed. If the true meaning be otherwise, one would have expected a clause giving the person who is made to pay a right of recovery from the person who has reaped the profits on which the tax is, in accordance with s. 38, to be paid.

I confess I know of no instance where a tax on the property of A is made payable by B and B is not given the right of recovery. I cannot admit that the income tax regulations as regards property of husband and wife are a case in point, because husband and wife are still in the strict view of the law one person.

It remains to be seen whether the latter clauses of sub-s. 2 of s. 45 agree with this interpretation. I think they do. I think the second clause was put in to prevent the argument being used that when a business has ceased there is no person in existence to whom the present participle of the first sentence can be strictly applied. As to the third, I think it fits exactly the case of a change during the accounting period. It allows the Commissioners to make a new accounting period which will fit both the old proprietorship and the new. It does not, in my opinion, give the Commissioners an option to tax A or B as they like, for if they did not do what they may do, then although the end of the period would be under the reign of B, if I am right in my first decision, he would not be

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

obliged to pay for the part of the accounting period during which he was not in the saddle. Upon the opposite contention clause 2 suits well enough, but clause 3 admittedly gives the Commissioners a right to impose the tax on A or B as they think fit, a very peculiar position.

For these reasons I am of opinion that the appeal should be allowed and the judgment of Rowlatt J. restored.

LORD ATKINSON. My Lords, it is unnecessary to state the facts at any length. The appellant company in this case was, under the Companies Act, 1908 and 1913, incorporated on December 28, 1914, and on January 1, 1915, received the certificate of the Registrar of Companies entitling it to commence business.

It has been assessed in respect of excess profits accruing in two separate accounting periods, the first of which extended from August 31, 1913, to August 31, 1914, and the second of which extended from August 31, 1914, to December 31, 1914, a period of four months. It thus appears that the company came into existence only three days before the termination of the second accounting period.

The amount of the net profits for which the appellants were assessed in respect of the first accounting period was 22,000*l.*, the sum payable being 50 per cent. of this—namely, 11,000*l.*, and the net amount of excess profits for which it was assessed in respect of the second period was 8333*l.*, the sum payable being 60 per cent. of that—namely, 5000*l.*

A previously existing company bearing the same name as the appellants' company and for convenience sake styled the old company, but a separate entity, sold all its property to the appellant company, and thereupon went into liquidation for the purpose of transferring its business to the appellant company. After this reconstruction, for such it was, had been carried out, the old company was not only wound up but was dissolved in October, 1915. It was not disputed that the old company was earning profits in such a way that, had it continued in existence, it would have been liable to be assessed for excess profit.

It does not appear whether the directors of the new company were identical with those of the old, or whether the shareholders of the new company were different from those of the old, but it was not questioned and could not, I think, have been successfully questioned, that the business of the new company was nothing but a continuance of that of the old. Since the Finance Act only came into force on December 23, 1915, the appellant company could not well be expected to have by their agreement of transfer dated December 30, 1914, made special provision beforehand for the payment of any excess profits duty that might thereafter be assessed upon the purchasers. They did, however, by that agreement, as part of the consideration, undertake to pay, satisfy and discharge all the debts, liabilities and obligations of the old company of whatsoever kind . . . . and to keep the old company and its liquidators and contributors indemnified against such debts, liabilities, obligations, contracts and engagements, and against the actions, costs, proceedings, charges, claims and demands in respect thereof.

If the old company could have been properly assessed for the whole or any portion of the sum for which the appellant company have been assessed for excess profits duty, Sir John Simon, as I understood him, pointed out that under this indemnity clause the burden of that liability would ultimately fall on the new company. If this be so, then it should not be forgotten when the alleged hardship and injustice of the course which has actually been taken is dwelt upon. The Commissioners of Inland Revenue, purporting to act under s. 45, sub-ss. 1 and 2, of Finance (No. 2) Act, 1915, claimed the right to make the assessment already mentioned upon the appellant company, as being the persons "for the time being" owning or carrying on the business so continued of the old company, in respect of the profits of that business accruing during the two accounting periods already mentioned. No dispute as to the correctness of the facts and figures above mentioned has arisen, and the sole question for decision on this appeal is whether, in the circumstances already detailed, the appellant company can be legally assessed

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Lord Atkinson.

for the excess profits of two accounting periods during which the business was in fact carried on by the old company.

By s. 38 of this Finance (No. 2) Act of 1915, it is enacted that the excess profits duty is to be charged, levied and paid on the sum, less 200*l.*, by which the profits for any accounting period ending after August 4, 1914, and before July 1, 1915, exceed the pre-war standard of profit as defined by this part of this Act. The amount of this excess profit duty to be paid is 50 per cent. of this excess. The whole excess is charged with this duty.

By sub-s. 2 of this s. 38, it is provided that where an accounting period is a period of less than a year, the section shall have effect as if there were substituted for 200*l.* a proportionately reduced amount.

As it is this excess over the figures of the standard year of the profits of the trade or business accruing during the accounting periods which is charged, and not the owners of, or persons who conduct the trade or business in which those profits are earned, the Commissioners claimed that, notwithstanding the change of ownership between the companies, they had, under the provisions of sub-s. 2 of s. 45 of the aforesaid Act, power, in their discretion, to assess the appellant company in respect of the profits of the business which accrued while it was being carried on by the old company.

They assert that they exercised this power properly under all the circumstances, since it was, in their view, the only means of preventing profits of a kind admittedly chargeable to excess profits duty from escaping taxation altogether owing to the dissolution of the old company, and the transfer of its business assets and liabilities to the new.

The Commissioners may be in error in this view. Sir John Simon, as I understood him, contended that they were in error in it, and indicated a means by which the old company could, notwithstanding its dissolution, be revived for the purpose of being made liable to pay its debt to the Crown—namely, the duty payable in respect of the excess profits made while it owned and carried on the trade and business which has been transferred to the appellant company. But

even if revival could be effected, I fail to see how the appellant company would be benefited, if the indemnity clause contained in the transfer agreement of October, 1915, be wide enough, as I think it is, to cover the debt for which the old company in its revived condition would be made liable. In this particular case it does not appear to me that there would be any more injustice or hardship involved in making the appellant company pay the duty to which it has been assessed directly to the Crown, than in throwing the burden of the duty on the old company and then requiring the appellant company to indemnify the former for the discharge of this burden. Moreover, even though the Commissioners should have been in error in supposing that profits properly chargeable with excess profits duty could escape taxation unless they assessed the appellant company as they have done, that error would not vitiate or make illegal and void this latter assessment if in other respects they had power to make it. They would not be bound to discover and apply the remedy Sir John Simon suggests, even if they knew of it and thought it workable. Justice did not demand that it should in this case be resorted to.

They claim that s. 45, sub-s. 2, confers upon them the power which they purported to exercise under the existing circumstances. That sub-section and the preceding one run as follows: " (1.) The excess profits duty shall be assessed by the Commissioners of Inland Revenue, and shall be payable at any time, not being less than two months, after it is assessed. The Commissioners may, in any case where they think fit, allow the duty to be paid in instalments of such amount payable at such times as the Commissioners direct. (2.) The duty may be assessed on any person *for the time being* owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Lord Atkinson.

Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date."

It will be observed that in neither of these sub-sections is any reference whatever made to a normal accounting period. Or to an accounting period ascertained by the normal methods prescribed by the earlier provision of the statute. No doubt in the third limb of the sub-section, but in that alone, does the expression " accounting period " occur. That period is not, however, an ordinary accounting period. It is, on the contrary, a period which the Commissioners may, if they think fit, create for the express purpose of dealing, where a change has taken place in the ownership of the trade or business, with the profits with which the Commissioners are concerned. And so special in its nature is this accounting period, so untouched by the general provisions contained in the first limb of the sub-section are the profits accruing in the course of it, that a special taxing clause has of necessity, in my view, to be introduced to enable the Commissioners to assess the person who owned or carried on the trade or business at the date when the change took place, that is, at the last day of the special accounting period so created.

If, as is contended on behalf of the appellants, the expression " for the time being " occurring in the first and second lines of sub-s. 2 means the last day of the accounting period during the whole of which period the person to be assessed owned and carried on the trade and business mentioned, then the taxing clauses contained in the last two lines of the sub-section are mere surplusage. The moment the Commissioners had fixed the period ending at the date of the change as the special accounting period, the powers to assess contained in the first lines of the sub-section would operate automatically ; but if, as the Crown contends, the expression " for the time being " means the time when the assessment is actually made, then these added words are absolutely

necessary, because the change of business may have occurred, if not must have occurred, before the day when the assessment is made, and the person owning and carrying on the business at the date of the change would be a different person from the predecessor of the person owning it and carrying it on at the date of the assessment.

The first sub-section of s. 45 deals with the assessment of the excess profits duty, and the times at which after it has been assessed that duty shall be payable. It would be strange indeed if the selection of the persons upon whom that duty is to be assessed, and by whom it is consequently to be payable, depended, not on the matters specially mentioned in the first sub-section, but upon something not mentioned in the first or second limbs of the section at all, and only mentioned in the last limb in the manner I have pointed out.

The main, if not the only, argument urged on behalf of the appellants against treating the expression "for the time being" as the date when the assessment was actually made was the injustice and hardship which would ensue if the person assessed only became the owner of the trade or business in the middle of an accounting period.

Under such circumstances he (the successor) might, it is urged, be assessed on profits made not by himself but by his predecessor. But it is the profits of the business of which he became owner, rightly treated as a continuance of that which his predecessor owned, that is charged, not the successor himself. That alleged injustice may, no doubt, occur, but the special powers conferred upon the Commissioners by the third limb of the second sub-section are, I think, given for the purpose of remedying such injustice or hardship, whichever it may properly be called. These powers, if properly exercised in cases which call for their exercise, appear to be capable of working out the desired result, and one has no right to assume that the Commissioners will refrain from exercising these powers in cases in which they, in their discretion, think they should be exercised. The strange thing, however, is that an injustice of the very same kind

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Lord Atkinson.

as that complained of might result from the method of assessment contended for by the appellants. If, for instance, the accounting period were twelve months in length, and the change of ownership took place within two months of its termination, then, according to the appellants' contention, the new owner might be assessed in respect of all the excess profits made up to the last day of the twelve months, although he had only been two months an owner. Nothing but the exercise by the Commissioners of their discretionary powers would save the sufferer in either case.

In my view, therefore, the words "for the time being" mean the time the assessment is made—that is really the question to be decided in this case. It was not a point for decision in any of the authorities to which we have been referred. I do not think these authorities really afford any help. For these reasons I am satisfied that the appeal fails and should be dismissed with costs.

LORD SUMNER. My Lords, for a taxing Act the words of s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, seem at first sight to be fairly and unusually plain. The section fixes the person to be charged. Does it or does it not cover the appellants? It covers three cases, the first, where a business has not ceased but continues; the second, where it does not continue but has ceased, these two, taken together, being formally exhaustive of all businesses that have existed, so as to be touched by the Act at all; and a third, which may further arise under either the first of these cases or the second, but need not be directly considered except in cases where Commissioners have exercised a statutory power of election, which is not the case here. Indirectly, however, it is of use, for (i.) it indicates that the section is intended to charge in the first instance, independently of change of ownership; (ii.) it affords a means of mitigating certain cases of hardship, which otherwise might arise under the earlier words by reason of a change of ownership; and (iii.) if the appellants' construction of the first case be right, neither this third case, nor indeed the second, need have been dealt with at all.

Now the words are "any person," not "the person," "for the time being owning the business" not "for the time of the accounting period owning the business." The business is in the present case the commercial enterprise of working the Wankie Pit, and it did not cease, except possibly temporarily, though the Wankie company was wound up and another Wankie company was incorporated and succeeded to the business. These words, whose grammatical meaning, as they stand, is quite plain, are surely intended to hit any person—the appellant company for instance—in whose ownership the business in question is to be found, at the time when a taxpayer has to be sought and charged. Sect. 38, sub-s. 1, makes the matter clearer still, for it shows that the subject matter charged is a business, so continuing as to possess both an accounting period and a period of pre-war standard profits. The owners of a business fluctuate, they come and go with changes in partnership, assignments, reconstructions and so forth, but the identity of the business remains and may be one of its most important assets. Taxation is no longer like the primitive method of taking tithes, a proceeding in rem. Some person must be found, whose pocket can be searched, but his relation to the profits, of which the revenue is to take a part, is accidental. He is the incumbent for the time being of the profitable business, and, if the profits are no longer in the business, that is not a reason for putting the revenue authorities to an uncertain and troublesome search for the party who took them out of it. Such is the scheme of this exceptional tax, and it appears to be due to the State's desire not to penalise the profiteer, but to participate in the fortuitous prosperity of a time of war. It may be rough and ready, but it is quite intelligible. It is capable of being expressed in simple language and I think has been so expressed.

My Lords, as one may see from the effect produced on the mind of one member of the Court of Appeal, the real force of the appellants' argument is the contention that the tax, as applied to them, works an injustice both strange in kind and gross in degree, by making one person pay another

H. L. (E.) 1922

WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS.

Lord Sumner.

person's debt, and that to avoid this injustice, if there be no ambiguity in s. 45 already, it is necessary to invent one, for the Legislature cannot be supposed really to have intended to work the wrong which the primary meaning of its words involves. I pass over the fact that this is not a case of making one person pay another person's debt, in the sense in which the common law shrinks from allowing such a thing, for the whole question is whose debt is it, the debt of the new Wankie company or the debt of the old? I think, however, that considerations of justice and injustice have not much to do with modern direct taxation; they belong to a different order of ideas. Taxation is concerned with expediency or inexpediency. It regularly results in one person being burdened for another's benefit, in the sense that the subject, who pays the tax, may be the last person to benefit by the expenditure of it. There is at any rate no close relation between paying public taxes and benefiting by public outlay. In time of war, when the State must get its money where it can, I think the injustice of some of the results of emergency taxation, if the term "injustice" is applicable at all, forms no clear guide to the meaning of a statute. For over thirty years in time of peace the State made a husband pay income tax on income, which was his wife's and not his own, and without any relaxation, regardless of such a consideration as that one person is paying another's debts, and even now the tax is paid on income, which in a spinster's case would go tax-free. Railway companies again are assessed under Sch. E in respect of some of their employees, and no provision is made for recouping to them the cost of collecting from the employee or for the risks of loss, when they exercise the right of recourse against him. The injustice, if any, in the present case lies rather in the imperfection of the remedy over against the old owner. It might have been fairer to have given the new company in this case a statutory right to charge the old company, the actual terms of the purchase of the business notwithstanding, but, if this has been overlooked, the injustice is no more than what happens under Sch. E; yet no one finds any ambiguity in

E on that account, though there is abundance of it otherwise. I think that the want of sufficient recourse against former "owners" is not a ground for imposing on s. 45, sub-s. 2, a non-natural sense.

My Lords, for these reasons I think that this appeal fails and should be dismissed.

LORD CARSON. My Lords, I agree with the views which have been expressed by my noble and learned friend, Lord Dunedin.

The short question is whether when a business has changed hands the owner is bound to pay to the Crown excess profits duty, which have accrued due in accounting periods when the business was owned by his predecessor and when he himself was not concerned or in any way identified with the business. The result of such construction of the Finance (No. 2) Act, 1915, would be to relieve the person who had received the profits altogether from any obligation to pay and also to leave the successor without any remedy against such person. In my opinion it would require clear and unambiguous enactments in the statute to effect this result, and I think it is open to comment that the learned judge who heard this case was of one opinion and in the Court of Appeal two of the three Lords Justices were of a different opinion, whilst in your Lordships' house two noble and learned Lords differ from the other three! That shows how unfortunate the Legislature has been in its attempt to clearly impose a tax upon the subject.

The question turns on the construction of s. 38 of the said Finance Act, which is the charging section, taken in conjunction with s. 45, sub-ss. 1 and 2, which is the machinery for assessing the tax. If s. 45 stood alone there would, I think, be no alternative but to hold that the Crown was entitled to succeed; but, in my opinion, when the two sections are read together, it is a reasonable construction to hold that the words in the forty-fifth section "any person for the time being owning or carrying on trade or business" refer to the owning or carrying on during the accounting

H. L. (E.) 1922 WANKIE COLLIERY CO. v. INLAND REVENUE COMMISSIONERS. Lord Carson.

period in which the profits are charged, and I do not see any difficulty in reconciling with this view the provisions in sub-s. 2 of s. 45 as to the cesser of the business or the change of ownership. It is quite true that what has been called the second limb of the sub-section may have been unnecessary on the construction I am giving to the section, but I think the draftsman may have thought it well to make it clear that, where a trade or business has ceased, the person who owned or carried it on immediately before the time of cesser was nevertheless to be regarded as owning or carrying on the business during the accounting period. The third limb, dealing with the change of ownership, seems to apply to a case where the change takes place in the middle of the accounting period and gives facilities for dividing the liability between the predecessor and the successor if that is thought necessary. But I cannot imagine that the Legislature ever intended in such event to leave it to the discretion of the Commissioners of Inland Revenue to say which of the persons should be liable for the tax. If this construction is a reasonable one, I think it is clear that we ought to apply it rather than bring about the results to which I have referred.

The opinion of Lord Finlay, expressed in the case of *Smith & Son* v. *Moore* (1), has been referred to. It is quite true that it is to be looked on merely as a dictum of the noble Lord, who was expressing a dissenting judgment; but I do not think there is anything in the judgments of the other noble Lords, who gave judgment in that case, which is inconsistent with it. The statement of the noble Lord is as follows and I entirely and respectfully agree with it: "It was contended that the effect of this enactment is that any owner for the time being of a business may be assessed to the excess profits duty although he had nothing to do with the business during the accounting period in which these excess profits were earned. It was insisted that this showed that the taxation was imposed upon the business and not upon the owner. I cannot so read the clause. The excess profits duty is charged not on the business but on the person who carried it on in the relevant

(1) [1921] 2 A. C. 13, 25.

accounting period. I cannot consider s. 45, sub-s. 2, as empowering the Commissioners to assess to the duty a person who had no interest in the business during the accounting period in respect of which the assessment is made. The last words of the sub-section providing for a change of ownership are meant to meet the case of a change of ownership in the course of an accounting period, and in such a case to enable the Crown to take the accounting period as ending at the date of the change and assess the duty on the person who carried on the business at that date. I agree with the view which is expressed by Rowlatt J. as to the meaning and effect of this clause (s. 45, sub-s. 2) in the case of *Wankie Colliery Co.* v. *Inland Revenue Commissioners.* (1) "

I think the appeal should succeed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 17, 1922.

Solicitors for the appellants: *Holmes, Son & Pott.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

(1) [1920] 3 K. B. 287.

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *April* 3.

MANCHESTER LINERS, LIMITED . . APPELLANTS;

AND

REA, LIMITED . . . . . RESPONDENTS.

Sale of Goods—Contract—Implied Warranty—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 1.

Where goods are ordered for a special purpose and that purpose is disclosed to the seller, so that in accepting the order he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment, within the meaning of s. 14, sub-s. 1, of the Sale of Goods Act, 1893; there is therefore an implied warranty on the part of the seller that the goods supplied under the contract shall be reasonably fit for that purpose, and the fact that the buyer knew at the date of the contract that the seller's sources of supply were limited does not negative that implication.

Gillespie Bros. & Co. v. *Cheney, Eggar & Co.* [1896] 2 Q. B. 59 discussed.

On October 8, 1919, the plaintiffs, who were shipowners of Manchester, ordered from the defendants, coal merchants of Liverpool, 500 tons of South Wales coal for their steamship *M.* at Partington on the Manchester Canal, and this order was accepted by the defendants. In the autumn of 1919, to the knowledge of the plaintiffs, the coal supply was in the hands of the Coal Controller, who restricted the supply for bunkering purposes to South Wales coal carried by sea, and a railway strike prevented the loading of vessels in South Wales, so that the only available supply was coal in stock at Partington (which was wholly inadequate) and on vessels then at sea. At the date of the contract a collier with a cargo of South Wales coal was diverted to Manchester by the Coal Controller, and the coal supplied to the plaintiffs came from this vessel. The coal was unsuitable for the plaintiffs' steamer, and as a consequence she had to return to port.

In an action by the plaintiffs for damages for breach of the warranty implied by the contract as to the character of the goods:—

Held, that the circumstances were not such as to rebut the implication of a warranty that the coal should be reasonably fit for the purpose for which it was bought, and that the plaintiffs were entitled to judgment.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Salter J.

The appellants, who were shipowners of Manchester, owned

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD CARSON.

the steamship *Manchester Importer*. The respondents were coal merchants of Liverpool and had a dockside office at Manchester and they supplied coal for the bunkering of steamers.

On October 8, 1919, it was verbally agreed between the appellants through their agent Mr. Watts and the respondents through their agent, Mr. Edwards, that the respondents should supply to the appellants 500 tons South Wales coal for the steamship *Manchester Importer* at Partington, and this agreement was confirmed by a letter of the same date. The coal supplied was unsuitable for the bunkering of the steamer, which was a natural draught steamer, and as a consequence the steamer was obliged to return to port. Thereupon the appellants brought an action against the respondents for damages for breach of the agreement. The appellants by their statement of claim alleged that it was an implied term of the contract that the coal supplied by the respondents should be fit for the purposes for which it was to be used, and claimed damages for the delay occasioned to the *Manchester Importer* by reason of the unsuitability for bunkering that vessel of the coal supplied. The respondents by their defence alleged that the coal supplied was suitable for bunkering steamers and, alternatively, that, as the appellants well knew, the only coal available to the respondents for supply as bunker coal to steamers was coal requisitioned by the Coal Controller; that it was an implied term of the contract that the coal supplied by the respondents to the appellants should be coal so requisitioned and made available; that by reason of the premises no other warranty was implied by statute or otherwise on the sale of the said coal except that the coal had been requisitioned by the Coal Controller and made available for bunkering purposes.

The facts are fully stated in the opinion of Lord Buckmaster and are summarised in the headnote.

Salter J. found as a fact that the coal supplied was not suitable for the purpose for which it was bought and that a warranty ought to be implied that the goods were fit for that purpose and he gave judgment for the appellants. The

H. L. (E.) 1922 MANCHESTER LINERS, LD. v. REA, LD.

Court of Appeal (Bankes, Warrington and Atkin L.JJ.) reversed this decision and ordered judgment to be entered for the respondents on the ground that in the special circumstances of the case the statutory warranty ought not to be implied.

1922. March 6, 7. *Langdon K.C.* and *E. C. Burgis* for the appellants. Salter J. was right in his conclusion that there was nothing in the special circumstances in which this contract was made to take it out of the ordinary rule as stated in s. 14, sub-s. 1, of the Sale of Goods Act, 1893, that where a person buys from a regular seller and states the object of his purchase there is to be implied a warranty that the goods are fit for that purpose. The Court of Appeal have based their judgment on the ground that the buyer did not make known to the seller, as he should have done, that he relied on the warranty, but if the buyer discloses to the seller the purpose for which the goods are required that is all that is necessary, and it is common ground that the purpose of the purchase was disclosed.

[They referred to *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (1); *Jones* v. *Just* (2); *Sumner, Permain & Co.* v. *J. G. Webb & Co.* (3); *Jones* v. *Bright* (4); *Preist* v. *Last.* (5)]

Sir John Simon K.C. and *A. T. Miller K.C.* (with them *Gilbert Jordan*) for the respondents. The special circumstances of this case are such as to rebut the implication of warranty. It would be difficult to say that the appellants relied upon the respondents' skill and judgment if the only available coal was a particular cargo of coal as to the quality of which the respondents had no knowledge, beyond the fact that it was bunker coal of some sort. The appellants knew that there was no stock of coal available on which the respondents could exercise their skill and knowledge. The true effect of the transaction was that the appellants were asking the respondents to give them coal out of the

(1) [1896] 2 Q. B. 59.
(2) (1868) L. R. 3 Q. B. 197.
(3) [1922] 1 K. B. 55; 27 Com. Cas. 105.
(4) (1829) 5 Bing. 533.
(5) [1903] 2 K. B. 148.

collier whatever it was, and if a purchaser himself selects the article the mere fact that the vendor knows the use for which it is designed will not raise an implied warranty, because the skill and judgment of the latter are not relied on in making the purchase: *Brown* v. *Edgington*. (1)

[They also referred to *Frost* v. *Aylesbury Dairy Co.* (2) and *Randall* v. *Newson*. (3)]

Langdon K.C. replied.

The House took time for consideration.

1922. April 3. LORD BUCKMASTER. My Lords, when the circumstances in which this appeal has arisen are examined, it will be found that its determination really depends upon the proper aspect of the facts rather than on an examination of uncertain principles of law.

The appellants are the owners of the steamship known as the *Manchester Importer*, and the respondents are coal merchants of Liverpool, who are in the habit of supplying coal for bunkering steamers.

In the autumn of 1919 the position of shipowners anxious to obtain coal for their steamers was one of peculiar difficulty. The coal supply was in the hands of the Coal Controller who had authority to restrict and direct supplies as he thought right, and, in addition, a railway strike had begun on September 27, lasting until October 7, with the result that the loading of vessels in the South Wales ports ceased, so that in October the only coal available for bunkering purposes at Manchester was the coal in stock at Partington or on vessels then at sea.

In October the appellants' steamer was at Partington waiting to be coaled, and shortly before October 7 one of the directors of the appellant company saw Mr. Bradley, who was agent for the Controller, and discussed with him the position of supplies. He was told as to the stock that was then in hand, which was 300 tons of South Wales coal, and 300 local

(1) (1841) 2 Man. & G. 279, 292. (2) [1905] 1 K. B. 608.
(3) (1877) 2 Q. B. D. 102.

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Buckmaster.

tons, and that it was quite inadequate to satisfy the demand; he was also informed that the Coal Controller was doing his best to divert a collier that would bring some 4000 to 5000 tons more coal into the port. Relying upon the prospect of this latter source, a form was obtained by the appellants from the Coal Controller known as a "pre-entry form," without which they would be unable to obtain coal. That was dated October 8 and was passed, entitling the appellants to obtain Welsh coal at Partington.

On the same day, following a telephonic communication, they sent an order to the respondents in these terms: "Referring to conversation with Mr. Edwards please supply five hundred tons South Wales coal for the steamship *Manchester Importer* at Partington on Friday, and oblige."

This order was accepted and coal was delivered under it which had been brought in by the vessel referred to by Mr. Bradley, which turned out to be steamship *Penrhys*; unfortunately the furnaces of the *Manchester Importer* were natural draught furnaces, for which the coal supplied was wholly unsuitable, so that the steamer was obliged to return to port. An action was then brought by the appellants claiming damages against the respondents for breach of implied warranty as to the character of their goods, which succeeded before Salter J., and failed in the Court of Appeal.

The grounds on which the judgment of the Court of Appeal depend are these: That the agent for the plaintiffs, who acted for them in obtaining the contract, knew, both by general knowledge and by special information, all about the coal position at the time when he made the contract, and knowing that the only coal that could be obtained was the coal from the steamship *Penrhys*, his order must be regarded as an order for satisfaction from that source, and this order was satisfied.

Both these propositions need to be modified in the light of the evidence. The knowledge possessed by the plaintiffs was undoubtedly that the coal supplies in Manchester were short and inadequate to the demand, and that a steamship, which turned out to be the *Penrhys*, was expected into port

containing coal. What the quality or character of that coal was they did not know, and they certainly did not order any coal as coal from that steamship.

It then remains to be considered whether in the circumstances there was any warranty that the coal was suitable for the purpose for which it was required. It is plain that the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply.

On this assumption, however, the respondents have argued that by virtue of s. 14 of the Sale of Goods Act, 1893, no warranty can be implied unless "the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment," and this the order in question fails to effect. This is, in my opinion, a misunderstanding of the statute, for the section embraces and restates the common law doctrine in the form which was clearly derived from the case of *Jones* v. *Just.* (1) If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment.

The view taken by Lord Russell C.J. in *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (2) appears slightly at variance with this conclusion though the result is the same, for he regards the common law as partly incorporated in the statute and partly remaining outside. In my opinion, the section completely incorporates the common law, and in no way limits its operation. There, therefore, was a warranty in this case, and the circumstances from which it is suggested that such a warranty can be negatived cannot be found. At the best the facts amount to no more than this—that the buyer knew that the sources of

(1) L. R. 3 Q. B. 197. (2) [1896] 2 Q. B. 59.

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Buckmaster.

supply of the vendor were limited, and they might, indeed, be confined to the cargo of a particular vessel. That does not negative an implication drawn from the face of the contract that the coal supply must be of a certain quality or it would be useless for the purpose in hand. The respondents themselves may well have been unaware of what was the character of the coal in the *Penrhys* until her cargo was discharged, but its general description of South Wales coal certainly included coal that might be suitable and would have satisfied the contract, and if the respondents found that its actual cargo was unsatisfactory for this purpose it was their duty to have informed the vendor at once.

I think the judgment of Salter J. is correct, and I think the judgment of the Court of Appeal should be reversed.

LORD DUNEDIN. My Lords, in this case I am entirely satisfied with the judgment of Salter J. It is only the fact that that judgment was reversed by the Court of Appeal that makes it necessary to say anything. The case has been argued upon the application to the facts of the provisions of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and as there has been some discussion as to the function of that section I should like to state my opinion on that point.

So far as a contract of sale, be it written or verbal, specifies the thing to be sold and bought, the terms of the contract rule. The tender of anything that does not tally with the specified description is not compliance with the contract. But when the article tendered does comply with this specific description, and the objection on the buyer's part is an objection to quality alone, then I think s. 14, sub-s. 1, settles the standard, and the only standard by which the matter is to be judged. "There is no implied warranty of quality except as follows."

Now the requirement made essential by this section is that the buyer makes known to the seller the particular purpose for which the goods are required, and then comes the additional qualification "so as to show that he relies on the seller's skill and judgment."

My Lords, I agree with Salter J.'s view of what was held by Lord Russell C.J. in *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (1) "Really," says Salter J., "Lord Russell seems to clearly say that the mere disclosure of a purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller." That disclosure of purpose we have in this case; the contract clearly discloses it: "Please supply 500 tons South Wales coal for the SS. *Manchester Importer*." And this was confirmed by the seller. This, as it stands, fulfils the requirements of the section, but then it is said, and it is this argument that has prevailed with the Court of Appeal, that when all the circumstances of the case are looked at it will be seen that the ordinary inference from such a contract ought not to be drawn. Now, I do not doubt that the whole circumstances of the case may be looked at, and that it would be possible that there should be circumstances which would prevent the ordinary inference being drawn. Just as if there had not been a mention of the purpose for which the coal was wanted in the contract itself it would have been legitimate to have proved by means of writing or conversations at the time of the making of the contract that the purpose was disclosed, so would other meetings or conversations at that time have been legitimately brought forward to show that the ordinary inference was not to be drawn. For instance, if there had been a conversation in which the seller had said: "I have only got such and such Welsh coal and I cannot guarantee it to be fit for bunkering for steamer, but I think it may do; you can have that if you like," and if, on the top of that, the contract had been made, then I think the ordinary inference of trust would have been displaced. But in this case there is nothing of that sort. The sole reason alleged is that owing to the coal control and the railway strike the supply of coal available for Manchester was very small, that the only chance of its being supplied was from the cargo of a steamer called the *Penrhys*, and that the buyer must be taken, as he was in the trade, and as one of his partners had had a talk with the Coal Controller, to have known these facts, so that the true

(1) [1896] 2 Q. B. 59.

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Dunedin.

interpretation of the contract was: "I will take such Welsh coal as is in the *Penrhys*, or such as the Coal Controller will give you."

My Lords, the person who made the contract was Mr. Watts. There is not a word in his cross-examination as to the *Penrhys*. He is merely asked as to the general situation, and he admits that he knew coal was short, and that the Coal Controller was master of the situation. But why is that inconsistent with the idea that he should trust to the judgment of the seller? It was not the buyer who was going to find the coal. He says to the seller: "I want 500 tons for a special purpose, will you give it me?" The seller could easily have guarded himself, but he merely answers "Yes," by confirming the proposal as made. Not only so, but he came into Court asserting that he did supply Welsh coal of suitable quality. In his judgment what he had given was sufficient. No doubt the fact is found against him, but that fact does not in any way destroy his attitude vis-à-vis to the buyer.

For these reasons I cannot agree with the learned judges of the Court of Appeal. I think the appeal should be allowed and the judgment of Salter J. restored.

LORD ATKINSON. The facts have already been sufficiently stated and it is unnecessary to repeat them.

It was agreed between the appellants and the respondents that if the latter should be held liable for breach of the contract, the amount of damage recoverable should be referred to some person to be subsequently agreed upon between the parties.

In their statement of claim the appellants set forth their causes of action in these words: (1.) That in placing their contract with the respondents they relied on the superior skill and knowledge of the latter and that it was an implied term of this contract that the coal should be fit for the purpose for which it was intended to be used: and (2.) that the coal actually supplied by the respondents was not fit for the purpose for which it was intended to be used, by reason whereof their said steamship, after proceeding down the

Manchester Canal and putting to sea, was compelled to put back to port and unload this coal.

The respondents in their statement of defence admitted the making of the contract relied upon, but alleged that the coal supplied by them was Nixon's navigation coal of merchantable quality, and answered the description of the coal which they contracted to supply and was in all respects suitable for bunkering steamers. And they put forward in the alternative in the words following the substantial defence on which they relied.

"(3.) Alternatively the agreement referred to in paragraph 1 hereof was made at a time when (as the plaintiffs well knew) the only coal available to the defendants for supply as bunker coal to steamers was coal requisitioned by the Coal Controller. It was an implied term of the agreement referred to in paragraph 1 hereof that the coal supplied by the defendants to the plaintiffs should be coal so requisitioned and made available. The said 500 tons of coal formed part of a cargo laden upon the steamship *Penrhys* which cargo was requisitioned by the Coal Controller and made available for bunkering in the conditions of emergency then existing. By reason of the premises the defendants will contend that no other warranty was implied by statute or otherwise on the sale of the 500 tons of coal, except that (as was the fact) it had been requisitioned by the Coal Controller and made available for bunkering as aforesaid."

Salter J., who tried the case without a jury, found that the 500 tons of coal actually delivered was not reasonably fit for an ordinary average Manchester steamer like the *Manchester Importer* in the hands of average officers and crew. There was ample evidence given before him to sustain that finding, and it is not really impeached. He also found that there was a warranty impliedly given by the respondents that the coal supplied should be fit for a Manchester steamer of the ordinary class in the hands of the ordinary class of Manchester crew; and that the *Manchester Importer* was an ordinary type of Manchester vessel and was handled by an

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Atkinson.

ordinary Manchester crew and officers with fair and ordinary competence.

It has been long well established at common law that if a man knowingly sells an article for a particular purpose he impliedly warrants that it shall be reasonably fit for that purpose: *Jones* v. *Bright*. (1) It is by no means necessary at common law that the buyer at the time he contracts or proposes to buy should state the purpose for which he requires the goods. If the seller knows from past transactions with the buyer or otherwise what is the purpose for which the buyer requires the goods, it will equally be implied that the seller warrants them to be reasonably fit for that purpose. *Drummond* v. *Van Ingen*. (2)

It was contended, however, on the part of the respondents that the Sale of Goods Act of 1893 (56 & 57 Vict. c. 71) had by its fourteenth section qualified and narrowed this doctrine of the common law. This statute is entitled: "An Act for codifying the Law relating to the Sale of Goods." Codification, and nothing more, is its declared object and function. That fact, to which I shall refer more at length hereafter, should, I think, be borne in mind in construing its language. So much as is relevant of this fourteenth section runs as follows: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose."

It was argued that this sub-section throws upon the buyer the burden of showing not only that he has made known to the seller—expressly or by implication—the particular purpose for which the goods are required, but also that he relied

(1) 5 Bing. 533. (2) (1887) 12 App. Cas. 284.

upon the "skill and judgment of the seller" in selecting the goods to be supplied. Three questions arise upon this contention: (1.) Does not the buyer by (as in the present case) expressly stating in the contract of purchase the purpose for which he requires the goods, prima facie at all events, show to a seller whose business it is to supply goods of the description required, that he relies upon the latter's skill and judgment sufficiently to satisfy the provisions of this subsection? And (2.) Would not the same result follow if the seller was before or at the time of purchase by implication made aware by the buyer of the purpose for which he (the buyer) required the goods? (3.) May there not be a class of cases lying outside the ambit of s. 14 which are yet covered by the common law doctrine?

These three questions are dealt with by Lord Russell C.J. in *Gillespie Brothers Co.* v. *Cheney, Eggar & Co.* (1) In that case the written contract of purchase and sale did not contain any mention of the particular purpose for which the goods were required. The plaintiffs, who were commission agents, had received from their principals in Barbadoes a letter requesting them to send to Barbadoes to these correspondents a cargo of the best coal they could get, suitable for the bunkering of steamers and ships of war, and standing well with the British and Foreign Admiralty Lists. The defendants were coal merchants, whose business it was to supply coal of the kind required. The plaintiffs gave to the defendants this letter and left it with them. About a month later the plaintiffs entered into a written contract with the defendants for the purchase of 500 tons of coal described on the invoice as Cyfartha Merthyr steam coal to be shipped to their correspondents in Barbadoes who were named in the contract. The coal was found to be quite unfit for the purpose for which it was bought. An order was made at chambers that the question of liability should first be tried on the assumption that the coals in question were not fit for bunkering purposes. At the trial of this question, defendants' counsel objected to the admission in evidence of the letter

(1) [1896] 2 Q. B. 59.

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Atkinson.

received by the plaintiffs from their correspondent in Barbadoes. The Lord Chief Justice admitted this letter in evidence. He is represented as saying (1): "I come to the conclusion that the plaintiffs, the buyers, by shewing to the defendants the letter of May 18, 1895, from the plaintiffs' principals stating what was wanted and for what purpose it was wanted, did by clear intimation make known to the defendants the particular purpose for which the coals were required, and in that statement there is, I think, the further consequence involved that the buyers were relying upon that intimation to the sellers, and relying on the sellers' skill and judgment in supplying an article which would be reasonably suitable for the purpose in question."

Further on he said: "It is clear also, to my mind, that section 14 is intended to deal with cases in which there is nothing in the contract itself from which it appears that the buyer made known to the seller the particular purpose for which the goods are required, or that he relied on the sellers' skill and judgment. Those are facts which are to be supplied ab extra by other evidence."

The following authorities, I think, establish that the first and second of the above-stated questions should be answered in the affirmative. They do not, however, support, but are, on the contrary, irreconcilable with the proposition laid down by Lord Russell C.J. as to the limited application of s. 14.

In *Preist* v. *Last* (2) (the hot-water bottle case) Collins M.R., as he then was, says: "Speaking for myself, I regard that subsection" (i.e., sub-s. 1 of s. 14) "as merely expressing the law as it existed at the time of the passing of the Act."

In *Bristol Tramways, &c., Carriage Co.* v. *Fiat Motors* (3) the appellants, by contract in writing, bought from the respondent a Fiat omnibus and six motor chassis. The contract of purchase did not contain any mention of the purpose for which these machines were required by the buyers. When delivered, they were found to be unfit for the purpose

(1) [1896] 2 Q. B. 64. (2) [1903] 2 K. B. 148, 154.
(3) [1910] 2 K. B. 831, 836.

for which they were bought. An action was accordingly brought to recover damages for breach of warranty. The trial judge found that the plaintiffs had fully made known to the defendants the purpose for which the machines were required. He also found that the buyers relied on the defendants' skill and judgment and that the goods were of a description which it was in the course of the sellers' business to supply. Cozens-Hardy M.R., as he then was, in delivering judgment said: "The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of the earlier decisions, such as *Chanter* v. *Hopkins* (1), or *Shepherd* v. *Pybus*. (2) The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law." The Master of the Rolls then proceeds thus: "Turning to section 14, it is plain that the defendants were told that the omnibuses were required for heavy passenger traffic at Bristol. I am disposed to think that such a statement of purpose suffices to shew that the buyer relied upon the seller's skill and judgment without any further evidence on the point, but, however that may be, I think there was in the present case ample evidence that the plaintiffs did rely upon the defendants' skill or judgment. This being so, there was an implied condition that the omnibuses should be reasonably fit for the declared purpose, unless the defendants can rely upon the proviso at the end of sub-s. 1 of s. 14."

The case of *Jacobs* v. *Scott Co.* (3) in this House supports those already cited as to the proper answer to be given to questions one and two; but as to the limited reach of s. 14, Lord Davey in giving judgment expressly said that s. 14 only consolidated the law. In the present case the statement of the purpose for which the coals were required, is on these authorities, prima facie, sufficient to show that the

(1) (1838) 4 M. & W. 399. (2) (1842) 3 Man. & G. 868.
(3) (1899) 36 S. L. R. 611.

H. L. (E.) 1922 MANCHESTER LINERS, LD. v. REA, LD. Lord Atkinson.

buyers, the appellants, relied upon the skill and judgment of the respondents so as to satisfy sub-s. 1 of s. 14. It is established that on October 8, when the appellants gave the order for the 500 tons of coal, Welsh coal of the kind described could only be acquired and brought to the port of Manchester under the requisition of the Coal Controller, and even then should be water borne; that local merchants in Manchester could only get such supplies of bunker coals as should be allotted to them by the Coal Controller; that they were, however, free to buy South Wales steam coal wherever they could find it and to bring it to Manchester if they could so manage.

The respondents had a practical monopoly in Manchester of the Welsh coal supply, but there were only about 300 tons of such coal then in stock in Manchester. About that time the Coal Controller succeeded in bringing by requisition up to Partington a steamer named the *Penrhys* laden with a considerable cargo of what purported to be bunker coal. The respondents took no part in bringing this steamer to Partington, but they were aware that the coals she carried were intended to be used for bunkering purposes. The railway strike ended on the 6th or 7th of October. I cannot find in the case any evidence whatever that the respondents ever communicated directly or indirectly to the appellants that they had no coal to supply in fulfilment of their contract, other than what they might obtain from the *Penrhys*. Nor did they ever inform the appellants or cause or procure them to be informed as to what was the kind or nature of the coals composing the *Penrhys* cargo, nor did they ever inquire from the appellants whether they would be willing to accept the coal carried in this ship in lieu of the coal they had purchased. Neither is there a shred of evidence that the appellants ever consented directly or indirectly to do anything of this kind. The cross-examination of the witnesses examined on behalf of the appellants was not even directed to this point. The appellants did not, in my view, in any way relieve the respondents from the obligations their contract imposed upon them. A warranty then that the coals they would supply would be fit for the purpose for which the appellants required them remained, in my view, in full

force and effect. They do not plead that it was impossible for them to have performed their contract; on the contrary, they plead they have performed it by supplying a substitute for the coal contracted for.

When, therefore, the respondents, purporting to act in the discharge of the obligations imposed upon them by their contract, caused the bunkers of the *Manchester Importer* to be filled with 500 tons of coal from the cargo carried by the *Penrhys*, they must be held to have taken the risk of this coal not being of the kind and character they had warranted that the coal sold should be. I cannot concur with the Court of Appeal, if they have come to the conclusion that the circumstances existing at Manchester rendered it impossible for the respondents to exercise their skill and judgment as to the coal which should be supplied to the appellants' ship and therefore relieved them from exercising that skill or judgment. The respondents have not in their pleading relied upon any such impossibility.

I think the appellants were entitled to assume that the respondents would exercise the skill and judgment they had contracted to exercise so as to secure that the coal which they caused to be filled into this ship's bunkers would be fit for the purpose for which they must be taken to have known the appellants required it. I am, therefore, of opinion that the order appealed from was erroneous and should be reversed, that the decision of Salter J. should be restored, and this appeal allowed with costs here and in the Court of Appeal.

LORD SUMNER (read by LORD DUNEDIN). My Lords, in this appeal there are two questions: (1.) whether the statutory implied condition is satisfied and (2.) whether the express terms of the contract or the circumstances exclude it. I take it that the buyer must prove the first and the seller the second.

The crucial time is the time when the contract is made. The buyer has to make known, expressly or by implication, the particular purpose for which the goods are required. He has to do this, so as to show that he trusts the seller's skill and

H. L. (E.) 1922

MANCHESTER LINERS, LD. v. REA, LD.

Lord Sumner.

judgment to supply something reasonably fit for the purpose. That this was done is hardly in dispute. With great respect to the opinions of the Lords Justices I cannot see that this involves an express statement of the buyer's reliance in any form, though sometimes, as in *Gillespie's Case* (1), this actually occurs. *Frost's Case* (2), however, and *Preist's Case* (3) are instances in which communication of the reliance is inferential. The words of s. 14 (i.) are "so as to show," not "and also shows." They are satisfied, if the reliance is a matter of reasonable inference to the seller and to the Court, and in this case I think the evidence supports the finding of Salter J. that the inference ought to be drawn.

When the circumstances contra come to be looked at, I suppose that they must be facts common to both parties. Both must know or have notice of them. I do not see how difficulties in satisfying the condition, which would tend to deter the seller from contracting on the terms of it, can be relied on in rebuttal, if they are known to the seller only. Bankes L.J. seems to have thought that the implication only arises where the circumstances are such as to afford to the seller some reasonable opportunity of exercising his skill and judgment towards selecting and supplying goods which will satisfy the condition. This may well be when both parties know, or should know, that the seller has no such opportunity; but in this case I much doubt if even the seller thought that he had not that opportunity, and am not at all satisfied that, if it was so, the buyer thought or should have thought so too.

My Lords, I doubt if the defendants ever developed the facts sufficiently in evidence: they seem to have relied too exclusively on the railway strike and the system of coal control, which no doubt were common knowledge. It was argued generally, that at such a time all implied conditions and guarantees are suspended, and that a buyer must take what a seller can get for him, providing that it answers the description. In this very wide form I know of

(1) [1896] 2 Q. B. 59. (2) [1905] 1 K. B. 608.
(3) [1903] 2 K. B. 148.

nothing to support the contention. One must examine the facts to see whether they were such as, to the minds of both parties, would exclude the statutory implication. Alternatively, it is said that the contract was really for the supply of specific ascertained goods—namely, coal ex the *Penrhys*, tale quale. I am afraid I can only say that it was not. In fact it was not proved that the buyer knew that he must take her coal or nothing, and it was clear that, down to the trial, the seller believed her coal to have been suitable for their purpose.

As for the licence system, it really does not advance matters much. The owners of the *Manchester Importer* were allowed to get Welsh coal, if or when they could. The licence itself does not tie them to the cargo of any particular ship. It is not as though the seller had shown that no coals were available but the cargo of the *Penrhys*, and that their quality was so dubious, that they could be sold only on caveat emptor terms. To say that the seller did not know what cargo the *Penrhys* had and therefore could not intend to warrant something unknown is an argument which fails, not merely because it rests on a unilateral state of mind, but also because, as he knew nothing against it and did know it to be South Wales coal, there is no reason why the seller should reject the natural implication.

What then are the circumstances? Both parties to the contract were in the coal trade; both knew of the effects of the strike on the working of the control. The seller, however, was and the buyer was not specially conversant with South Wales coal, and, though both were fully alive to the difficulties of the time, the difficulties that they both felt related, in my opinion, solely to the scarcity and not at all to the quality of the coal available. In fact these coals were part of a considerable quantity, which the officials of the Coal Control had diverted to the Mersey as a general bunkering supply. I do not think it is shown, that even the seller had any reason to doubt that the coal would be fit for ordinary bunkers, or to suppose that the officials had not taken reasonable steps to ensure that the coal, which they had

H. L. (E.) 1922 MANCHESTER LINERS, LD. v. REA, LD. Lord Sumner.

secured, would be suitable for the purpose. In fact, if they had not done so, they would have been stultifying their own action and aggravating the famine, which they were trying to relieve. As to the buyer, I see no grounds at all, on which to impute to him knowledge that the quality of the coal must be so much a matter of uncertainty or of chance, as that no reliance on the seller's skill and judgment ought to arise on his side. I therefore think that the judgment of Salter J. should be restored.

I will only add that, if s. 14, sub-s. 1, applies, the case is disposed of, but I do not wish to be supposed to think that any other condition or warranty is left outstanding in such circumstances beyond what the code describes.

LORD DUNEDIN. My Lords, I am authorized to state that my noble and learned friend Lord Carson agrees with the judgments that have been delivered.

Order of the Court of Appeal reversed and judgment of Salter J. restored. The respondents to pay the costs in the Courts below and the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 3, 1922.

Solicitors for the appellants: *Holman, Fenwick & Willan, for Vaudrey, Osborne & Mellor, Manchester.*

Solicitors for the respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF POPLAR . . . . . } APPELLANTS;

AND

ROBERTS . . . . . RESPONDENT.

H. L. (E.)* 1922 *March* 20.

Distinguished. RAWLANCE *v.* CROYDON CORPN. [1952] 2 Q.B. 803

Rating—Assessment—Beerhouse—Tied House—Premium on Assignment of Lease—Restriction on Rent—Standard Rent—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 4—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1.

In arriving at the valuation for the purposes of the Valuation (Metropolis) Act, 1869, of a hereditament to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies the maximum gross value to be assigned to that hereditament is not limited to the standard rent of the hereditament together with the additions thereto permitted by the latter Act:—

So *held* by Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Parmoor; Lord Carson dissenting.

Held, further, by Lord Buckmaster, Lord Atkinson, and Lord Parmoor, Lord Sumner expressing no opinion on the point, that the Act of 1920 is not to be taken into account in determining the valuation for rating purposes of the hereditaments to which it applies.

Decision of the Court of Appeal [1922] 1 K. B. 25 reversed.

APPEAL from an order of the Court of Appeal affirming an order of the Divisional Court (1) upon a special case stated under s. 40 of the Valuation of Property (Metropolis) Act, 1869, in an appeal against the valuation list for the parish of Poplar made in the year 1920.

The appeal raised a question of general importance upon the construction of the Valuation of Property (Metropolis) Act, 1869, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (hereinafter called the Rent (Restrictions) Act), in relation to the rating of hereditaments to which the latter Act applies.

The appellants were the Assessment Committee of the Metropolitan Borough of Poplar. The respondent was the

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD CARSON.

(1) [1922] 1 K. B. 25.

H. L. (E.) 1922

POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

occupier of a beerhouse known as the "Cobden's Head" situate in that parish and he dwelt on the premises.

The facts are fully stated in the case which is set out in the report before the Divisional Court and the Court of Appeal, and may be thus summarised.

By a lease dated February 16, 1909, the premises were demised by Mann, Crossman and Paulin, Ld., who were brewers, to Emily Esther Chamberlin for a term of twenty-one years from March 25, 1909, at a rent of 40*l.* per annum, the lessee paying all rates and taxes, except landlord's property tax; and the lessee covenanted not to buy or sell on the said premises any malt liquor except liquor purchased from the company. The lessee paid to the company a premium of 850*l.* upon the granting of the lease. After divers mesne assignments the lease was on November 26, 1919, assigned to the respondent in consideration of a sum of 1800*l.* paid by him to the assignor.

The rateable value of the premises on August 3, 1914, was 48*l.* and that, being higher than the actual rent paid by the respondent, was by virtue of s. 12, sub-s. 1 (*a*), of the Rent Restrictions Act, 1920, the standard rent of the premises.

In the valuation list for the quinquennial year 1920 as altered and approved by the appellants the said hereditament was assessed at 112*l.* as the gross value and 94*l.* as the rateable value. The respondent claimed that the assessment should be reduced to 67*l.* gross and 56*l.* rateable and gave notice of appeal to quarter sessions. Thereupon it was agreed between the parties that the facts should be stated in the form of a special case for the opinion of the King's Bench Division. Of the questions stated in the special case the following alone are material to this appeal:—

"(2) Whether the said Rent (Restrictions) Act, 1920, in its application to the said hereditament is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act 1869?

"(3) Whether the highest gross value which can be assigned

to and placed upon the said hereditament in the said Valuation List for the year 1920 is the 'Standard Rent' (within the meaning of the said Rent (Restrictions) Act, 1920) applicable to the said hereditament plus the highest increase or increases of rent provided for and set out in Section 2 (1) (*c*) and (*d*) of the said Act ?

"(4) Whether in calculating the Gross Value of the said hereditament the capital sum paid on the assignment of the said lease can be taken into account ? "

The Divisional Court (Darling, Avory and Salter JJ.) answered questions 2 and 3 in the affirmative and question 4 in the negative and ordered that judgment be entered at quarter sessions for the appellant (the present respondent).

The Court of Appeal by a majority (Scrutton and Atkin L.JJ ; Bankes L.J. dissenting) affirmed the decision of the Divisional Court. Bankes L.J., though holding that the provisions of the Act of 1920 did not determine the rateable value of the hereditament, was of opinion that those provisions must necessarily be taken into account in arriving at the valuation of the hereditament.

Jan. 30, 31 ; Feb. 2. *Talbot K.C.* and *Sydney Turner* for the appellants. By s. 4 of the Valuation (Metropolis) Act, 1869, "gross value" is defined as the annual rent which a tenant might reasonably be expected taking one year with another to pay for an hereditament if the tenant undertook to pay all usual tenant's rates and taxes and the landlord undertook to bear the cost of the repairs and insurance and "rateable value" as the gross value after deducting the probable annual cost of repairs and insurance. But the rent therein mentioned is only a means of arriving at the value of the occupation of the hereditament to the occupier and the actual rent is relevant only in so far as it represents that value. Accordingly the test has been applied not only to cases where the owner is himself the occupier but to cases where a tenancy is physically or legally impossible. The Rent Restrictions Act, 1920, was not intended to affect the law of rating and cannot be so applied without inflicting

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

an unfair burden upon other ratepayers. It operates, not upon the value of the occupation of the hereditaments to which it applies, but merely upon the rent recoverable for them. The standard rent ascertained under the Act for the hereditament in question on this appeal is admittedly far below the true annual value thereof and the judgment under appeal is erroneous as treating the standard rent, with the additions allowed by the Act, as fixing the gross and rateable values of the hereditament. It follows from that decision that two precisely similar hereditaments will be differently rated according as the hereditament is occupied by the owner or is let subject to the limitations of the Rent Restrictions Act, 1920, and the effect is to defeat the object of the Metropolis (Valuation) Act, 1869, which, as appears by the full title of the Act and by the preamble, was "to promote uniformity in the assessment of rateable property in the metropolis." The hypothetical rent being merely machinery for ascertaining value, the question to be determined in this case is what rent would a tenant pay for the value of his occupation if he were free to give it. In *Owens College* v. *Chorlton-upon-Medlock Overseers* (1) the Court of Appeal held that as the governors of the college had no power under the Act by which they were incorporated to become tenants of the site of the college they could not be regarded as hypothetical tenants, but that decision was overruled by the House of Lords in *London County Council* v. *Erith Churchwardens.* (2) Lord Herschell there stated that it had never been doubted that the rent actually paid by the occupier did not necessarily indicate what was the rent which a tenant might reasonably be expected to pay and that an owner who was in occupation and who might not be willing to let on any terms was none the less rateable. He then discusses the *Owens College Case* (1) at length, and in expressing his dissent from the decision of the Court of Appeal he points out the startling results which would follow from that conclusion and rejects

(1) (1887) 18 Q. B. D. 403.
(2) [1893] A. C. 562, 588, 589, 593-95.

the notion that the rateable value of premises owned by a statutory corporation can depend upon the question whether the corporation has or has not power under the Act by which it was incorporated to become the tenant of those premises. In *Winstanley* v. *North Manchester Overseers* (1), which was the case of a burial ground, there could be no question of the possibility of a tenancy, but the point was not raised, because it was recognized that the test founded on rent was merely a notional or hypothetical test. Accordingly it has been held in several cases that persons who occupy land or houses rent free under the terms of a charitable trust are nevertheless rateable: *Rex* v. *Catt* (2); *Rex* v. *Munday* (3); *Rex* v. *Green*. (4) Those cases are a fortiori because there no rent at all could be demanded. No doubt they were decided long before either the Parochial Assessments Act, 1836, or the Valuation (Metropolis) Act, 1869, but they are still good law inasmuch as those Acts did not alter the principle upon which property was to be assessed for rating purposes but merely confirmed the practice which had been established by the Courts under the Act of Elizabeth. In this case the actual rent is no true criterion of value, for, first, the respondent paid a substantial premium for the residue of the lease, and, secondly, this is a tied house and he paid a reduced rent for the house by reason of the tie. He is paying part of his rent in the shape of premium and part in the extra price he is charged for the beer, and the shape in which he pays the rent cannot alter the rateable value of the house. The tie is to be disregarded and the rateable value must be measured by the rent which might be expected from a free tenant: *Sunderland Overseers* v. *Sunderland Union* (5); *Bradford-on-Avon Assessment Committee* v. *White*. (6) Upon principle any restriction, statutory or otherwise, limiting rent is to be disregarded in determining the question what is the annual value of the property to be rated.

(1) [1910] A. C. 7.
(2) (1795) 6 T. R. 332.
(3) (1801) 1 East, 584.
(4) (1829) 9 B. & C. 203.
(5) (1865) 18 C. B. (N. S.) 531, 569, 581-3.
(6) [1898] 2 Q. B. 630, 636.

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

In all the cases cited by the respondent in the Courts below it was a restriction as to the use of the property or the value to be derived therefrom by the occupier which was relied on as affecting the rateable value of the occupation; but the restriction under the Rent Restrictions Act is not a restriction as to the use of the property, but a restriction as to the sum which the tenant can be compelled to pay for his occupation of it. In *Staley* v. *Castleton Overseers* (1) a cotton mill, which had been closed down because no cotton could be got from America, was sought to be rated as a mill, but it was held to be rateable only as a storehouse for valuable machinery. In *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (2) a railway was constructed under an Act of Parliament, which provided that the London and North Western Railway Company should have the right to run their traffic over a part of the line on payment of a fixed rent, which was in fact less than the actual value of the traffic passed over the line by the London and North Western Railway Company. It was held that the owners of the line could not be rated in respect of that portion of the line at any higher value than the fixed rent, because it was struck with sterility by the Act of Parliament beyond the amount of the rent. *Sculcoates Union* v. *Hull Dock Co.* (3) follows the same principle and is so explained by Lord Buckmaster in *Port of London Authority* v. *Orsett Union Assessment Committee.* (4) In *Lincoln Corporation* v. *Holmes Common* (5) the Corporation were the owners and occupiers of the soil of a common, subject to the right of the freemen to depasture certain cattle on the common. It was held that the Corporation were not rateable in respect of the common because the profit à prendre in the freemen exhausted the whole value of the occupation. *Reg.* v. *Fletton Overseers* (6), where the rent received was beyond the value of the premises, has no bearing on the present case and can perhaps be supported on the same ground as *Altrincham Union Assessment Committee* v. *Cheshire Lines*

(1) (1864) 5 B. & S. 505, 513.
(2) (1885) 15 Q. B. D. 597, 602.
(3) [1895] A. C. 136.
(4) [1920] A. C. 273, 305.
(5) (1867) L. R. 2 Q. B. 482.
(6) (1861) 3 E. & E. 450, 464.

Committee (1); but see as to this decision Ryde on Rating, 4th ed., p. 329. The result of the authorities may be summed up as follows: The object of the whole system of rating law, built up partly by legislation, partly by judicial decision, is to assess occupiers of rateable property equally in proportion to the value of their occupation. That value is stated (1.) by practice before 1836, (2.) by statute, in the form of a hypothetical annual rent payable by the occupier for the right to use and enjoy the property occupied. The hypothesis of rent is merely the appointed means of arriving at annual value and must never be so used as to defeat the purpose for which it is made. Accordingly the hypothetical rent need not be, and seldom is, a rent which any one actually pays; and in many cases it is a rent which no one possibly could pay. It is annual value stated in terms of an annual payment for the right to occupy the property valued. Anything therefore which does not affect the use to which the property can be put or the income to be derived from the occupation of it is to be disregarded in fixing the hypothetical rent. It is for this reason that it has been held to be immaterial whether the property could be let at all, whether any particular person could legally or in fact be tenant of it, whether it is illegal to charge any rent for it; although all these things have obviously the most material bearing on the question what rent can be obtained for it in fact. On the same principle it is immaterial whether the rent which an occupier can be obliged to pay is limited by law; for such a limitation can affect neither the use to which the property can be put nor the income to be derived from the occupation of it. Therefore questions 2 and 3 in the case should be answered in the negative and question 4 in the affirmative.

Konstam K.C. and *Wootten K.C.* (with them *R. M. Banks*) for the respondent. The Acts of 1836 and 1869 rigidly impose the rent which a tenant might reasonably be expected to pay for the hereditament as the measure of the value of the occupation, and the cases cited only punctuate the rigidity of that measure by laying down certain assumptions which

(1) 15 Q. B. D. 597.

H. L. (E.) 1922

POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

must be made without which that measure cannot be applied. The appellants have failed to show any measure of value which can be substituted for that provided by Parliament. Lord Herschell's dicta in the *Erith Case* (1) have been misunderstood and have been explained by his Lordship himself in the *Sculcoates Case.* (2) It is not contended that the actual rent must be taken as the measure of the value of the occupation, but by the Rent Restriction Act, 1920, the highest rent which can be required in this case from any tenant for the hereditament is the standard rent of 48*l.* plus the permitted increases, and, in the respondent's submission, the Assessment Committee cannot go beyond that limit. As no tenant can be expected to pay a higher rent than can be legally demanded from him the maximum rent allowed by the Act is conclusive of the rateable value of the premises. Value is a question of demand and supply and here the demand is restricted by Act of Parliament. The test is not the remunerative value to the occupier, but the rent which the occupier may be expected to pay for the whole benefit of holding the premises: *Rex* v. *Bradford* (3); *Rex* v. *Attwood* (4); *Rex* v. *Bridgewater Trustees* (5); *Reg.* v. *West Middlesex Waterworks.* (6) No doubt the Rent Restriction Act has this effect that two identical houses may be rated differently, but this Act produces all sorts of anomalies. The decision of this House in *Great Western and Metropolitan Ry. Cos.* v. *Kensington Assessment Committee* (7) as to the effect of existing statutory arrangements limiting competition upon the rateable value of the portions of the railways which were there assessed applies by analogy. Just as the statutory restriction on competition affected the subject matter in that case so the statutory restriction on the rent recoverable affects the subject matter here. The hereditament to be regarded is the hereditament impressed with the statutory restrictions affecting it. The *Altrincham Case* (8) and the *Sculcoates Case* (9)

(1) [1893] A. C. 562.
(2) [1895] A. C. 136.
(3) (1815) 4 M. & S. 317.
(4) (1827) 6 B. & C. 277, 281.
(5) (1829) 9 B. & C. 68.
(6) (1859) 1 E. & E. 716.
(7) [1916] 1 A. C. 23.
(8) 15 Q. B. D. 597.
(9) [1894] 2 Q. B. 69, 84, 88; [1895] A. C. 136, 147–150.

are also analogous by reason of the conditions imposed by the Legislature upon the profit-earning capacity of the subject matter in whosesoever hands it might be. The decision of the majority of the Court of Appeal in the latter case corresponds with the appellants' argument in the present case, but that decision was reversed by this House. The profits earned by the occupier are only the measure of the rent which a hypothetical tenant can be reasonably expected to pay: per Lord Davey in the *Sculcoates Case* (1), and the actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament: *Port of London Authority* v. *Orsett Union Assessment Committee.* (2) Here there is an artificial condition which sounds in rent.

Talbot K.C. replied.

The House took time for consideration.

1922. March 20. LORD BUCKMASTER. My Lords, the question in this case can be readily stated, though it is not so easy to answer. It is simply whether the Act of 1920 affects the rateable value of the hereditaments to which it applies. The appellants say that it does not, and the respondent, fortified by the judgment of the Divisional Court and of two out of the three learned judges of the Court of Appeal, asserts that it does. The statute applies to a house or part of a house let as a separate dwelling where the annual amount of the standard rent or the rateable value does not exceed in the Metropolitan Police District 105*l.* The property in question is a licensed beerhouse obviously within that limit. For all houses so included it is enacted by s. 1 that on any increase of rent after March 25, 1920, and during the continuance of the statute by more than the amount permitted under the statute beyond the standard rent, the amount shall be recoverable by the tenant. The standard rent is by s. 12 declared to be the

(1) [1895] A. C. 151. (2) [1920] A. C. 273, 288, 305.

H. L. (E.) 1922

POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

Lord Buckmaster.

rent at which the house was let on August 3, 1914, or, if the rent on that date was less than the rateable value, the rateable value should be regarded as the standard rent.

The respondent is the occupier of a house licensed for the sale of beer either on or off the premises, known as the "Cobden's Head," Bromley-by-Bow, in the metropolitan borough of Poplar. The house was leased by the brewers on February 16, 1909, for twenty-one years from March 21 of that year at a rent of 40*l.*, with the provision compelling the lessee to buy malt liquor from the lessors, and a condition that if that covenant were broken they could at their option obtain a further rent of 80*l.* A premium of 850*l.* was paid for this lease. On November 26, 1919, the respondent paid 1800*l.* for the lease. The rateable value of the hereditament on August 3, 1914, was 48*l.* For the quinquennial year 1920 the appellants, who are the Assessment Committee of the Metropolitan Borough of Poplar, assessed the property at 112*l.* gross and 94*l.* as the rateable value. The respondent claims that by virtue of the statute these valuations should be reduced to 67*l.* gross and 56*l.* as the rateable value. If the limitations imposed by the Rent Restriction Act upon the power of the landlord to increase the rent be properly taken into account in determining the assessable value, the appellants are wrong; but if they should be disregarded they are right, and no other question arises on this appeal.

For the appellants it is contended that the underlying principle of the Metropolitan Rating Act of 1869 is that the value of the hereditament to the occupier should be the basis of assessment to the rates, and that there should be equality as between each occupier holding similar property, so that the burden of local taxation may be equitably distributed and borne. If these assumptions be accepted, the appellants must succeed. The difficulty lies in seeing whether that really is the basis upon which the Act of 1869 rests. The statute, although its preamble dwells on the expediency of establishing a common basis of value and promoting uniformity of assessment, does not in terms say that it is the value of the

occupation that has to be fixed. What it does provide is that the gross value means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament on the assumption that he undertook to pay rates, taxes and tithe, and the landlord undertook the cost of repairs and insurance.

It is round the true meaning of this section that the dispute centres. The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was stated by this House in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), and I do not think that the language which I there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the provisions of the Rent Restriction Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, as landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was said by counsel for the appellants that so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very

(1) [1920] A. C. 273, 305.

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Buckmaster.

object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes.

This, my Lords, is my opinion as to the meaning of the Act itself; but I find that a series of authorities, which have not been questioned and are now of considerable antiquity, support this view. The earliest was the case of *Rex* v. *Catt.* (1) In that case the master of a free school appointed by the minister and inhabitants of a parish under a charitable trust, who occupied the house and garden belonging to the school, was held rateable, the ground of his liability being that he was in beneficial occupation. It appears that the terms of the charity in that case would have prevented the receipt of any rent by the trustees of the charity, the whole object of which was to provide a house and garden for the use of the master of the school. In *Rex* v. *Munday* (2), the officials of a charitable foundation in actual occupation of an almshouse were all held to be rateable, although, again, the almshouse could not have been let under the terms of the trust. Again, it was the actual beneficial occupation that was the subject of the rating, and the question as to what rent the actual landlord was capable of exacting did not enter into the calculation. In *Rex* v. *Green* (3) the inhabitants of almshouses were rated, although

(1) 6 T. R. 332. (2) 1 East, 584. (3) 9 B. & C. 203.

the property was the subject of a charity, but the case did not say in terms whether the patrons of the charity—who were the Merchant Taylors' Corporation—were at liberty to have let the houses to other people. This latter case, therefore, cannot be regarded as affording much assistance in the present dispute, but the earlier authorities are directly in point. In both cases the property was incapable of being let at a rent, and was dedicated to and only capable of being used by persons who paid no rent at all. Although these authorities were long antecedent both to the Act of 1836 and the Act of 1869, yet these statutes have not affected the principle upon which occupation is made the test of liability for assessment, and I cannot find that anything in the subsequent authorities has impeached or ignored the principle upon which these cases rest.

The case of *Great Western and Metropolitan Ry. Cos.* v. *Kensington Assessment Committee* (1) has, I think, been subject to misunderstanding. In that case the question that arose was the old and difficult problem of determining upon what principle the portion of a railway running through a parish should be the subject of assessment. The whole principle of rating in such a case really depends upon a refined abstraction. A small fraction of a railway line forming part of an entire system and cut off by the boundaries of a parish, can hardly be made the subject of a tenancy at all, but, if it were to be regarded in the ordinary way as being let and hired, it is obvious that the question of who can hire it might be brought into account as a means of determining value on the basis of competition for its use; but if it be found that by Act of Parliament the only possible tenant is excluded, other methods of determining the value remain to be used; and it was this, and no more, that was referred to in the opinion expressed in that case. It is, however, a different proposition to assert that the limited right of the owner to receive rent is the same thing as limiting the number of people who can occupy and will pay. If there is only one such occupier possible, the method of assessment is then to discover

(1) [1916] 1 A. C. 23.

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS. — Lord Buckmaster.

what is the value of the occupation to him of that tenement, disregarding the profits that arise from the special quality of individual enterprise and skill; and it was this method that was adopted in the case mentioned.

The case of *London County Council* v. *Erith Churchwardens* (1) does not appear to me of much assistance. The real effect of the decision there was that the owner must himself be regarded as a possible tenant; but the respondents argue, and I think with reason, that as it is only in the nature of hypothesis that he can be so considered, it follows that he enters the field subject to the advantages and drawbacks attaching to the tenancy, and his position as landlord must be disregarded. The conclusion I have reached is independent of the view put forward by Bankes L.J. that in fact there is no restriction imposed on the tenant to prevent him paying rent; he can pay it if he pleases without any breach of the statute, but this fact would, in my opinion, be fatal to the respondents even if the opinion I have expressed did not commend itself to your Lordships' approval.

LORD ATKINSON. My Lords, I concur. It is unnecessary to restate the facts.

I think the decision appealed from was wrong, and that this appeal should be allowed. I come to this conclusion on the broad ground that this temporary statute of 1920, expiring on June 23, 1923, dealing only with one class of hereditament, dwelling houses, is not, and was not, intended to be a Valuation Act interfering with the system of valuation set up by the Valuation of the Metropolis Act of 1869, which is practically identical in its terms with those of the Parochial Assessments Act of 1836. Its title reveals its true object. Its abbreviated title is: "The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920," and its fuller title is: "An Act to Consolidate and Amend the Law," not with respect to valuation or rating, but "with respect to the increase of rent and recovery of possession of premises in certain cases, and the increase of the rate of interest on, and

(1) [1893] A. C. 562.

the calling in of securities on such premises," and for other purposes. These are the things which are alone within its scope and reach.

What the ratepayer is, under both the Act of 1836 and that of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, and though no rent is or could be received in respect of it. The statutory measure of the rateable value of this occupation is the annual rent which a tenant might be reasonably expected to pay one year with another for the hereditament occupied if the tenant undertook to pay all the usual tenant's rates and taxes and tithe commutation rentcharge, if any, and if the landlord undertook the other expenses, if any, necessary to maintain the hereditament in a state to command the rent, after deducting therefrom the probable average cost of the repairs, insurance and other expenses, as aforesaid. That is the measure, and the only measure of the rateable value which is provided. It is to be applied to the hereditament, no doubt, rebus sic stantibus, but this rent is merely a notional or speculative thing. The tenant who is expected to be ready and willing to pay it, in many cases, if not all, has not, and cannot have, any real existence, and the payment of any rent for the hereditament by any person may, in fact, as I shall presently show, be absolutely prohibited by law, statutory or other. This tenant has been, therefore, appropriately styled the "hypothetical tenant," and so unreal may his existence be that the owner-in-fee of the hereditament, who is in beneficial occupation of it, may play the part of the hypothetical tenant, ready to pay the annual rent mentioned in the statute for his own property. This imaginary rent is not to be confounded with the rent which an actual tenant in possession in fact pays. It may naturally be assumed that the hypothetical tenant would take this latter into consideration, along with many other things, including the capacity of the hereditament and its adaptabilities,

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Atkinson.

in calculating the amount of the rent he might be expected to pay; but the actual rent paid by the actual tenant is not, and cannot be, treated as a measure of, or a substitute for, the hypothetical rent which conceivably might be expected from a hypothetical tenant. It therefore appears to me that where you find a statute dealing exclusively with actual rent paid by actual tenants, actual increases of such rent, evictions from the hereditament in respect of which the actual rent is paid, and the interest paid by the mortgagors of such a hereditament, the natural conclusion to arrive at is that this statute was not designed or intended to deal with the rating of hereditaments at all. That, in my view, is precisely what this statute of 1920 is. From beginning to end of it there is not an allusion to the "hypothetical tenant," or to the rent he might be expected to pay. Annual rent paid by actual tenants and the increases of it, actual interest paid on actual securities, are the subjects with which it exclusively deals. Save the provision of s. 12, sub-s. 9, it does not contain a single provision that I can find containing a direction to rating authorities as to how they are to rate, or referring to any enactment relating to rating, or as to the means by which the rental or gross value of hereditaments is to be determined. It is plain, I think, from the provisions of the Act, that the evil it was designed to cure was not excessive or defective rating. The evil it was obviously designed to prevent was the exploiting by landlords of the great demand for dwelling houses, of which the supply was inadequate, in order to exact excessive rents for the dwelling houses they owned. And yet the main effort of the respondents in this case appears to be to substitute the "standard rent" plus its possible increases for the sum at which the beneficial occupation would be rated under the former systems. But, there again, this can only apply to the case of actual tenants in possession, because standard rent is by s. 12 defined to be the rent at which the dwelling house was let on the 3rd day of August, 1914, or in the case of a dwelling house not let at that date, the rent at which it was first let. All the cases in which no tenancy exists, or can exist, though the occupation of them may be most beneficial, are left untouched

by the Act. These latter, however, are not the only dwelling houses left untouched by the Act. Sect. 12, sub-s. 7, provides that where the rent payable in respect of a dwelling is less than two-thirds of the rateable value thereof, which apparently means the rateable value fixed under the old system, the statute is not to apply to that rent or that tenancy or to any mortgage taken by the landlord under whom the tenancy is held. For instance, if the rateable value of a dwelling as fixed under the old system be 126*l.* per annum, two-thirds of this would be 84*l.* If the annual rent was a low one, say, 40*l.*, and it was by an arrangement doubled, i.e., increased 100 per cent. and raised to 80*l.*, the tenant could get no redress, and the old mode of valuation would continue to apply to it; but if the rent were increased to 85*l.*, which would exceed two-thirds of the rateable value by 1*l.*, the old standard of rateable value would be superseded, and, as I understand the contention, the rent would be fixed at the standard rate plus its possible increases. Results such as these seem to show that it was never designed to supersede by this Act the old system of rating dwelling houses. Again, it cannot, I think, be disputed that equality of rating is and should be one of the main objects of all rating systems. Well, if one takes the case of a man who built four dwelling houses all of the same rateable value as fixed under the old system at 100*l.* per annum. If he should let one in the open market at a rent of 100*l.* per annum, lived in another, let the third to his son at 65*l.* per annum, and the fourth to his daughter at 70*l.* per annum, the rateable value under No. 1 will be fixed at the standard rent plus the possible increase. No. 2 cannot be dealt with under the Act of 1920 at all as there is no tenant. No. 3 will be left untouched by the Act as the rent is less than two-thirds of the rateable value, and the rateable value of No. 4 will be fixed under the Act at the standard rent plus the possible increases.

It is unnecessary to refer at length to all the well-known cases which have established that a private person or a public body in occupation of his or its own property can be treated under the old system of rating as a possible hypothetical

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Atkinson.

tenant, and be rated in respect of the beneficial occupation of his or its property whether he or it has or has not power to let it or to receive rent for it. The *Erith Case* (1); *Winstanley* v. *North Manchester Overseers* (2); and *Port of London* v. *Orsett Union Assessment Committee* (3) are sufficient examples of this; but the case of *Owens College* v. *Chorlton-upon-Medlock Overseers* (4) is such a remarkable and convincing authority that it may be permissible to refer to it at much greater length than would otherwise be pardonable, establishing as it does that the realities of a case may, when necessary, be ignored when one comes to determine what rent the hypothetic tenant may be presumed to be willing to pay to become tenant of the premises whose rateable value is to be determined. There the Trustees of the college were incorporated under an Act of Parliament. They were, by this Act, empowered to acquire and hold land as a site for a college, and to erect buildings upon it for a college; but they had no power to sell or to let this land. In pursuance of this statute they purchased land in fee simple and erected upon it buildings which they used for the purpose of the contemplated college. The college could not be carried on at a profit, situated where it was, inasmuch as the expenses would always exceed the amount derived from students' fees. The college premises having been rated to the poor rate on a gross estimated rental of 3833*l.*, it was found, in a case stated on appeal against the rate, that it could not (without considerable structural alteration) be let for any purpose to which it was capable of being devoted for more than 1300*l.* per annum, which would fix the rateable value, after the proper deductions, at 1083*l.* This the Trustees were willing to be rated at, but they contended that they were not liable to be rated at a larger sum than this because, being unable under the provisions of their statute to let the college premises, they were themselves to be excluded as possible hypothetical tenants for them. The Court of Appeal, consisting of Lord Esher M.R., Bowen L.J. (as he then was),

(1) [1893] A. C. 562.
(2) [1910] A. C. 7.
(3) [1920] A. C. 273.
(4) 18 Q. B. D. 403.

and Fry L.J., upheld this contention, and decided that (assuming the Trustees to be rateable at more than a nominal amount) they, being themselves unable to rent the premises by virtue of the applicable statutory provisions, must be excluded from consideration as possible tenants, and therefore that the rateable value must be reduced to 1083*l.* 6*s.* 8*d.* That is, in other words, the Court had regard to the realities of the case, and decided that the Trustees should be put aside and disregarded as imaginary hypothetical tenants. They accordingly declined to assume that the Trustees should, even notionally, be treated as persons anxious to become tenants from year to year at a rent of their own premises, since their statute enacted that they could not become tenants of those premises, in fact, at all. In the judgment of this House in the *Erith Case* (1) the judgment of the Court of Appeal in this case of Owens College was dealt with and it was held that the assumption on which that judgment was founded was erroneous. In Lord Herschell's judgment one finds this passage: "The point was first glanced at in the judgment of the Master of the Rolls in *Reg.* v. *School Board for London.* (2) 'If' (said the learned Judge) 'by the terms of any statute, it' (the school board) 'could not legally be tenant, it would be excluded from the calculation.'" Lord Herschell continues: "The view thus suggested was adopted by the Court of Appeal as the ground of their decision in the case of *Owens College* v. *Overseers of Chorlton-upon-Medlock.*" (3) He then states the facts of that case and says: "My Lords, I have stated fully the reasons which led the learned Judges to the conclusion that the governors of Owens College were to be left out of account as possible tenants when determining the annual value of the premises occupied by them, and I have most carefully considered these reasons with all the respect that is justly due to the views of the learned Judges who concurred in them; but I am unable to share the opinion they expressed. The conclusion arrived at is in its result

(1) [1893] A. C. 562, 593, 595. (2) (1886) 17 Q. B. D. 738.
(3) 18 Q. B. D. 403.

H. L. (E.) 1922

POPLAR ASSESSMENT COMMITTEE v. ROBERTS.

Lord Atkinson.

sufficiently startling. Two public bodies might have erected buildings similar in all respects upon lands similar in situation and of equal value; and these buildings might be occupied in the same way and applied to the same purposes; and yet, if one of these bodies had power, under the statute constituting it, to hire such buildings, and the other had no such power, the rateable value of the buildings might, and almost certainly would, be different; that is to say, the buildings would have a different annual value, for the words in the Statute of William IV." (i.e., the Act of 1836), "which follow the expression 'annual value,' only provide a means of arriving at what is the annual value of the premises. Why should the annual or the rateable value of the premises for the purposes of the poor law depend upon the statutory power of the owner to take them, supposing he had not been the owner? I am unable to discover any satisfactory reason for this difference, and none seems to me to be suggested by the judgments in the *Owens College Case*. (1) I do not think the distinction drawn can be confined to premises belonging to and occupied by public bodies for public purposes. A private individual might receive money under an obligation to erect with it a building upon a particular site to be occupied by him during his lifetime, and with a prohibition against letting to anyone else. If the principle adopted in the *Owens College Case* (1) be a sound one, such an owner would, I presume, be equally excluded from consideration."

Mr. Talbot, on behalf of the appellants, cited several cases (in argument referred to as charity cases) to show that the principles embodied in the Act of 1836 were, in fact, applied to the rating of hereditaments long before the passing of that Act. They are interesting and instructive. *Rex* v. *Catt* (2) is the first of these. In that case the master of a free school was appointed by the minister and inhabitants of the parish under a charitable trust whereby a house, garden, etc., were assigned for the habitation and use of the master and his family freely and without payment of any rent or income, gift, sum of money or other allowance whatever for the teaching of ten

(1) 18 Q. B. D. 403. (2) 6 T. R. 332.

poor boys of the parish. The master was held to be rateable as he was in beneficial occupation of the premises though he was not, in fact, a tenant of them himself, and could not let them to a tenant, and though no rent could be reserved to any one in respect of them. The next of these cases was *Rex* v. *Munday* (1), decided in 1801. There certain persons who were objects of a charitable foundation were for their own benefit put into the actual occupation, in the manner prescribed by the rules of the institution, of the Almshouse and lands belonging to it, but liable to be dismissed for any breach of the rules. They were held to be rateable under the 43rd of Elizabeth, which provided that the rate should be imposed upon any occupation of land, because they were in beneficial occupation of the aforesaid premises and were therefore within the statute. The last of these cases was *Rex* v. *Green*. (2) There persons who were objects of a charitable foundation were in actual occupation of the almshouses, paying no rent for the same and removable at the pleasure of the patron of the charity. They were held to be rateable. Bayley J. in giving judgment said: "If they are occupiers of property from which they derive a benefit, they are rateable." Rateability did not depend on tenancy, or on the possession of any estate or interest in the property under consideration, or on the receipt of any rent from it, but solely on the beneficial occupation of it. This is in exact conformity with the principle of the decision in the modern cases above-mentioned. To make rateability depend on the fact that the person to be rated is, in fact, an actual tenant, or to make the rent payable by an actual tenant the measure of the rateable value of premises out of which the rent issues would be an absolute innovation, in direct conflict with the principles of the law of rating as established for over a century. No provision is, in my view, to be found in this Act of 1920 which would justify such an innovation. Its introduction in the case of the dwelling houses mentioned in this Act of 1920 should not take place in the absence of a clear statutory provision requiring it.

(1) 1 East, 584. (2) 9 B. & C. 203, 207.

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS. — Lord Atkinson.

I now turn to the only provision I can find in the Act of 1920 amounting to a direction to a rating authority as to how they are to rate any class of premises. It is contained in s. 12, sub-s. 9, rating houses built under housing schemes. This provision in no way affects houses of the class the subject of this appeal. In my opinion, therefore, the proper subject matter with which this Act of 1920 deals, is mainly the increase of the rents of dwelling houses and the increase of the interest on mortgages affecting them. It is not a rating Act, and does not, save in the case mentioned, in any way affect the system of the rating of such houses established by the Acts of 1836 and 1869. Nor does it provide any substitute for the rateable value of such houses as fixed by those statutes. It does not provide any measure by which the rateable value of dwelling houses can be determined.

I therefore am of opinion that question 3 should be answered in the negative. With regard to question 2, that, I think, should also be answered in the negative, because it deals with rent, not the value of beneficial occupation which is alone the subject of rating. Question 4 should, I think, be also answered in the negative, because the sum paid was paid in respect of getting the advantage of a tied house. This advantage, it has been decided, must be disregarded: *Sunderland Overseers* v. *Sunderland Union.* (1) Yet it is taken into account in fixing the standard rent under this Act. On the whole, I think this appeal should be allowed with costs here and below.

LORD SUMNER. My Lords, it is not disputed that the formula "the rent which a tenant would pay from year to year" refers to a hypothetical tenant. It is too late to dispute the decisions by which this has been established. The practical question in this case is whether the rent is as hypothetical as the tenant.

The formula is prescribed for the purpose of measuring the annual value of the hereditament for rating purposes, and the rating authority is entitled to the advantage of conceiving

(1) 18 C. B. (N. S.) 531, 569, 581.

the offers that would be made by the owner of the hereditament if he were not the owner, but wished to be the tenant of the owner, even though by law disqualified from being a tenant, and also the increased sum that would be offered by an occupier, though, in fact, legally entitled under a lease or otherwise to occupy at a less sum. Does this involve that the rent, which either of such persons would pay, is no less divorced from reality than is the person who wishes to rent his own house, to occupy beneficially that which is legally incapable of beneficial occupation, or to pay more than the sum for which the law entitles him to occupy? The hypothetical tenant of the decisions is an abstraction. Is the rent, which he hypothetically pays, nevertheless limited by legal considerations, which only apply between a real tenant and a real landlord?

In an able argument, Mr. Konstam contends for the respondent that it is. The statutory word "rent," he says, can only mean rent and no case has decided that it means anything else. A hereditament has no absolute annual value and the rent that it would command means nothing apart from the law and the bargain under which rent would be paid. Rent is something which the law will make a tenant pay and for which a landlord can distrain. A payment, even if actually made, which exceeds the payment legally compellable as rent, would to that extent not be rent, but would be a gift. Even a hypothetical tenant is a tenant; and, when he is conceived as paying rent, he is conceived as doing so under the conditions which the statute law imposes. Decisions, which extend imaginatively the area of possible tenants to infinity, do not thereby convert the statutory word "rent," which is a term of art, into a mere economic measure of value. Logic does not require that, in order to measure annual value, the hypothetical tenant should be conceived as being indifferent to a statute in his favour which says that the landlord cannot make him pay more than a certain sum.

My Lords, I am afraid that this argument must fail. I agree that the mere decision that an owner may be conceived to offer a rent for his own hereditament does not formally

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS. — Lord Sumner.

involve the consequence which is in debate, but as the decision would be irrational, if it did not rest on the assumption, that the whole formula is only a way of getting at rateable value on principles applicable to all hereditaments, however owned and however occupied, I think that the word "rent" must now be held to mean something which at any rate is not conditioned by the legal relations which exist between an actual landlord and an actual tenant. An occupier under a beneficial lease cannot require the annual value to be cut down to the rent actually reserved. Equally a hypothetical occupier, although he will occupy, if he occupies at all, under a beneficial statute, must not be supposed to limit what he is prepared to give in order to get the occupation of the hereditament, merely to the amount, the giving of which will enable him to retain it in the face of anything that an actual landlord could legally do against him. Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers. It may be observed that the phrase is "might be expected to pay"; it does not go on to say "and the landlord might be able to exact." If, as is contended, "rent" is throughout rigidly restricted to its meaning as a term of art, and the measure of value thus applied by hypothetical hands is the real thing, the result would be that the occupier, who already has been enriched under the Rent Restrictions legislation by receiving a statutory present of part of the value of his landlord's property, would profit still further and equally unmeritoriously by escaping from the rates, which the hereditament ought to bear, to the prejudice of other less fortunate occupiers. I say "ought to bear," because the only justification for the restriction is that the hereditament is really worth more by the year in the market than the landlord is allowed to charge, but that it is inexpedient that he should have the benefit of it. As a matter of fact, not only does the Act not deal with rating expressly except in another connection and for another purpose, but it actually (s. 2, sub-s. 1 (*b*)) enables the landlord to pass on to the tenant an enhanced burden of rates falling on himself, without

discriminating between an enhancement due to increased rateable value and one due only to increased poundage.

As a negative answer to the question, whether the rateable value is limited by the maximum rent payable under the Act, disposes of the appeal in favour of the appellant, I do not think it advisable to deal with any other question, and am not at present prepared to say, that the conditions created by the Act can have no relevance to the determination of rateable value. In some circumstances the existence of this legislation and its practical effect may be evidence bearing on the ultimate answer to the question, what rent a tenant might be expected to pay, though not conclusive of it, and I think it better that no opinion should be expressed to that effect till a concrete case arises which requires its determination.

My Lords, I think that this appeal succeeds.

LORD PARMOOR. My Lords, the appellants are the rating authority, and the respondent has been rated as the occupier of the "Cobden's Head," an hereditament which comes within the operation of the Rent Restrictions Act, 1920. The questions raised in the appeal are (1.) whether the maximum standard rent, which is recoverable under the Rent Restrictions Act of 1920, is to be taken into account in arriving at the valuation of the said hereditament under the Valuation (Metropolis) Act, 1869, and (2.) whether the amount of such standard rent fixes the highest gross value which can be placed on the said hereditament for the year 1920. In my opinion, the answer to these two questions depends on the same considerations, but it will be sufficient to consider whether the standard rent is the highest gross value which can be placed upon the said hereditament in the valuation list for the year 1920.

Apart from the operation of the Act of 1920, the "Cobden's Head" would be properly entered in the valuation list at 112*l.* gross value and 94*l.* rateable value. If, however, the maximum standard rent fixed in the Rent Restrictions Act, 1920, concludes the rateable value, then the above valuation should be reduced to 87*l.* on gross value and 56*l.* on the

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS. — Lord Parmoor.

rateable value. In my opinion, the decision of the appeal depends on the consideration of one or two of the fundamental principles which permeate the whole system of our rating law. Under 43 Eliz. c. 2, rates are to be levied upon every occupier of lands, houses, etc. The distinction between occupier and owner, in this connection, is of primary importance. The occupation value of property may be, and often is, distinct from its value to the owner. This distinction would probably be emphasized where an artificial statutory maximum is fixed, and a statutory restriction prevents an owner from recovering from any tenant a greater amount, as rent, than the statutory maximum. It has long been recognized that actual rents based on the contractual relationship between tenant and landlord are not the test of the value of a property for rating purposes. I do not think that there is any difference in this respect between a contractual or a statutory rental. In either case the same objections apply, and in either case the rateable value must be assessed in accordance with statutory directions. In the case of *Rex* v. *Skingle* (1) the Court of quarter sessions had held that the actual rentals reserved in leases were conclusive evidence of the value of lands for the purposes of the poor rate. This order of the Quarter Sessions was quashed, the Court holding that the case was too clear for argument. The cases on charitable trusts, quoted to your Lordships by the counsel for the appellants, come within the above principle. In *Rex* v. *Catt* (2) the argument was largely directed to the question whether the person proposed to be rated was, or was not, to be regarded as an occupier of the property within the statute of Elizabeth. Catt was held to be the occupier of the property for which he was rated, and therefore liable on the value of his beneficial occupation, although the house, etc., was assigned, under the terms of the trust, "for the habitation and use of the master and his family freely without payment of any rent, income, gift, sum of money or other allowance whatsoever." In *Rex* v. *Munday* (3) it was again decided

(1) (1798) 7 T. R. 549. (2) 6 T. R. 332.
(3) 1 East, 584.

that, although the objects of a charitable foundation were in the actual occupation of the almshouse and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, yet that they were liable to be rated as occupiers on the basis of the beneficial enjoyment of the property. This case again turned mainly on the fact that an occupier could be found, and that the words of 43 Eliz. c. 2 are general in directing that the rate for the relief of the poor is to be levied on every occupier of lands, houses, etc. In the case of *Rex* v. *Green* (1), the appellants against the rate were poor women, resident in the almshouses as almswomen, paying no rent for the same, and removable at the pleasure of the master, wardens and court of assistants of the company of Merchant Taylors. It was again held that where a person is found to be the occupier of a house he must be rated as such in the value of his beneficial occupation, though the house be appropriated to charitable purposes, and no rent is paid for the same.

It has long been recognized, as a matter of principle in rating law, that to make actual rentals the basis of rateable value would contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principle to all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority. Two illustrations will suffice. If a low actual rental is based on the payment of a premium, it is obvious that such rental does not denote the value of either the beneficial or profitable occupation of the particular property, and that to admit it as a test would be to give a benefit to a particular occupier,

(1) 9 B. & C. 203.

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Parmoor.

placing him at a special advantage as compared with other ratepayers in the same area. A second illustration can be found in the facts of the particular case under appeal. The "Cobden's Head" is a tied house, and the actual rental is lower than the true occupation value by the extent to which the tie covenant places a special disability on the tenant. It is recognized that in such a case the rateable value is assessed on the basis of the value of a free house, and the figures in the special case show that this basis gives a figure in excess, both of the actual rental, and of the standard rent, after allowing for increases, which may be added under the Rent Restriction Act of 1920. Rateable value is an assumed value based on an assumed rental. The method of ascertaining this assumed value is statutory. The present case comes within the provisions of the Valuation (Metropolis) Act, 1869, but there is no difference in principle between the statutory method directed in this Act and the statutory method directed in the Parochial Assessments Act, 1836. Prior to 1836, the same method was generally adopted in practice, although it cannot be said that this was universally the case. Under the Valuation (Metropolis) Act, 1869, the Assessment Committee is directed to ascertain the annual value which a tenant might reasonably be expected, taking one year with another, to pay if the tenant undertakes to pay all usual tenant's rates, taxes, etc., and the landlord undertakes to bear the cost of repairs, etc. This statutory direction must be followed in all cases, unless it can be shown that the Legislature in a particular case has directed a different method. It is notoriously difficult, in some instances, to ascertain the figure at which the assumed annual rent should be fixed, but it is the duty of an Assessment Committee, in all cases, to ascertain for this purpose as accurately as may be, the value of the beneficial or profitable occupation of the particular property, and then to make the statutory deductions. In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the

value of the beneficial occupation of the property or its profit-earning capacity. The special skill or industry of a particular occupier is not one of the natural conditions which attach to property and on this ground it is excluded from consideration in the assessment of rateable value. There is no certainty that the above considerations have formed the basis on which an actual rental has been fixed between landlord and tenant or that considerations, which would be excluded from an assessment of rateable value, have not been entertained. As stated above, such rental is not a conclusive consideration, whether it is contractual or statutory. The argument on behalf of the respondent is based on the proposition that, although a contractual or statutory rental applicable to an existing tenancy would not be conclusive, yet it becomes conclusive if made applicable, not only to an existing tenancy, but to any tenancy created during the time while the Act is in operation. I am unable to assent to this proposition. In my opinion the objections, as already stated, to adopting an actual rental as the basis of rateable value apply with the same force, whether such rental is limited to an existing tenancy, or is made applicable to all tenancies created during the operation of the Act. The fundamental distinction remains that the assumed rental, based on statutory directions for the purpose of ascertaining occupation value, is in itself a different thing from an actual rental which denotes the liability between owner and tenant, and which may depend on a variety of conditions other than those affecting the beneficial or profitable occupation of the property. In the charitable trust cases, referred to above, it does not appear to have been argued that a restriction on rent, applicable to successive tenants, in any way concluded the rateable value, or that if the person sought to be charged was in the position of an occupier, any other than the ordinary method should be adopted in ascertaining the value of the beneficial occupation of the property. If the Rent (Restrictions) Act, 1920, contained any provision which directly affected the statutory basis of ascertaining the rateable value of such a hereditament as the "Cobden's Head," then no doubt the standard rent

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Parmoor.

might be made the conclusive test of rateable value. The Rent (Restrictions) Act, 1920, contains no such provision. The object of the Act is not, except in the specified instances, to control the assumed rentals, as ascertained under the Valuation (Metropolis) Act, 1869, but to place a special statutory limitation on actual rentals, as between landlord and tenant, providing that if it is attempted to exact a rent in excess of the amount permitted under the Act, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. I can find no provision in the Rent (Restrictions) Act which would allow a different basis of rateable value to be adopted as between tied houses which come within the operation of the Act, and those of higher value, or which would make conclusive an actual rental which, apart from the Act, would not be conclusive for the purposes of a rate valuation. I think that the Rent (Restrictions) Act was passed to limit the amount of rental recoverable by a landlord from his tenant, and that it does not affect the statutory directions for ascertaining rateable value in the Valuation (Metropolis) Act, 1869, as applicable to the "Cobden's Head," and that it certainly is not conclusive on the question of amount.

In the Court of Appeal Atkin L.J. expresses his agreement in the judgment delivered by Avory J. in the Divisional Court, and says that, if no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense, that seems to be the limit of the rent a tenant can be reasonably expected to give. If the statutory rent actually enforceable is to be regarded as the same thing as the assumed rental for ascertaining rateable value, there would be no answer to the view expressed by the Lord Justice, but if they are not the same thing, and the same considerations and limitations do not apply, there appears to me to be no difficulty in following, as in other cases outside the operation of the Rent (Restrictions) Act, 1920, the directions of the Valuation (Metropolis) Act. Avory J., in delivering the judgment of the Divisional Court says (1): "Having regard

(1) [1922] 1 K. B. 25, 33.

to these decisions and to the fact that the restrictions imposed by the Rent (Restrictions) Act, 1920, attach to the house by whomsoever it may be occupied I am unable to imagine any tenant who would pay a rent for the house greater than that authorized by the Act." The decisions to which the learned judge refers are *Staley* v. *Castleton Overseers* (1); *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (2); *Sculcoates Union* v. *Hull Dock Co.* (3); *Port of London Authority* v. *Orsett Union Assessment Committee.* (4) These cases all show, to use the language of Blackburn J., "that any statutory restrictions on the profit-earning or rent-earning capacity of the hereditament must be taken into consideration." The question, however, remains whether a restriction on rent under the Rent (Restrictions) Act, 1920, can be regarded as a statutory restriction on the value to an occupier of the profit-earning or rent-earning capacity of the "Cobden's Head." Ordinary rent is not a restriction on the profit-earning or rent-earning capacity of an hereditament in the hands of an occupier and has never been so regarded. I am unable to see in what way a statutory restriction on rent payable from a tenant can operate as a statutory restriction on the profit-earning or rent-earning capacity of the "Cobden's Head," or how the value to an occupier is affected or controlled by the fact that a landlord cannot enforce, as against a tenant, a rent higher than the statutory standard rent in operation at the time. In the *Sculcoates Case* the statutory limitation of the amount of tolls receivable was no doubt a restriction on the profit-earning capacity of the hereditament, but the rent payable by a tenant to his landlord in respect of the hereditament of which the occupier is rated, leaves untouched the sources on which an assumed intending occupier would rely in assessing the probable benefit or profit to be received from his occupation of the hereditament. I cannot find any indication in any of the cases quoted

(1) 5 B. & S. 505, 513; 33 L. J. (M. C.) 178, 182.
(2) 15 Q. B. D. 597.
(3) [1895] A. C. 136.
(4) [1920] A. C. 273.

H. L. (E.) 1922 POPLAR ASSESSMENT COMMITTEE v. ROBERTS. Lord Parmoor.

that actual rent, whether statutory or not, and whether applicable generally or only to a particular tenancy, is a conclusive factor on rating values. In my opinion the Rent (Restrictions) Act, 1920, does not affect the ordinary principles of valuation applicable under the statutory directions of the Valuation (Metropolis) Act, 1869.

The appeal should be allowed with costs here and below.

LORD CARSON. My Lords, the only question we are asked to determine is the third question in the case stated—namely, whether the highest gross value which can be assigned to and placed upon the hereditaments in question in the valuation list for the year 1920 is the standard rent " within the meaning of the Rent (Restrictions) Act, 1920 " applicable to the said hereditaments plus the highest increase or increases of rent provided for, and set out in s. 2, sub-s. 1 (*c*) and (*d*), of the said Act ?

The three learned judges who heard the case in the King's Bench Division by a unanimous judgment answered this question in the affirmative. In the Court of Appeal Scrutton and Atkin L.JJ. gave judgments affirming this decision, whilst Bankes L.J., although holding that the Rent Restriction Act, 1920, must necessarily be taken into account in arriving at the valuation of the hereditaments, dissented for reasons to which I shall afterwards refer.

I agree with the decision arrived at by the King's Bench Division, and by the majority in the Court of Appeal. Under the Parochial Assessments Act, 1836, and the Valuation (Metropolis) Act, 1869, the basis of the net annual value which is to be assessed is the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditaments. That is the only guide laid down, and although in its application it has been found necessary in some cases to make " estimates of profit," or of " interest on cost," such calculations are merely relevant to the ascertainment of the rent.

Turning to the Rent Restrictions Act, which is applicable to the hereditament in question, we find that no higher rent

than the standard rent and statutory increases as thereby laid down can be enforced during the material period. Are we then, as the appellants' counsel contend, to disregard this statutory limitation of rent in ascertaining for valuation purposes the rent which the hypothetical tenant under the valuation would pay? Reading the Acts side by side and for a moment keeping my mind free from the entanglement of authorities which have been cited, I find it impossible to do so. I agree with Atkin L.J. (1) that "if no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give." But it has been argued before us, and it was upon this point that Bankes L.J. dissented from the majority in the Court of Appeal, that although the Rent Restrictions Act, 1920, may affect the rateable value of these premises, it does not fix the rateable value within the limits of the standard rent and statutory increases, because the Act does not prohibit the tenant from agreeing to pay more, although such excess could not be enforced and, even if paid, could be recovered back.

I cannot persuade myself that it is possible to ask the assessment authority to enter into such super speculative and hypothetical regions, and I am of opinion that the only rent we have to consider is a rent de jure recoverable and not a voluntary promise which cannot be enforced. It is only when one begins to consider the authorities which have been decided in the efforts of the Courts to apply the provisions of the Valuation Acts to various hereditaments differing very widely in their nature and the conditions of tenure from such a hereditament as that under discussion, that a difficulty arises. I do not propose to examine the authorities because they are fully dealt with in the judgments of Avory J. and the Lords Justices in the Court of Appeal.

In my opinion the result of the authorities and their application to various complicated cases which have arisen in attempting to estimate the rent a hypothetical tenant would pay is accurately stated in the following passage from the

(1) [1922] 1 K. B. 53.

H. L. (E.) 1922 — POPLAR ASSESSMENT COMMITTEE v. ROBERTS. — Lord Carson.

judgment of Atkin L.J. (1): "How then," he says, "is the annual rent to be ascertained? It is obvious that the definition pre-supposes that the premises are deemed to be vacant and are deemed to be capable of being let. Any restriction upon the owner in respect of the power to let must by the very force of the definition be excluded. Thus the owner who does not desire to let, or who by nature of the grant to him has no power to let, or who by statute is forbidden to let, is still rateable. Moreover the definition requires that he shall be deemed to be a possible tenant notwithstanding that he is already possessed of the property by statute or otherwise and that his powers of taking that property on an annual agreement are restricted or destroyed by statute or otherwise. This is the decision in the *Erith Case* above cited (2) following and followed by numerous authorities. But the principle of these cases is confined to freeing the owner from restrictions for the purpose of obtaining a hypothetical landlord and putting the owner in the class of hypothetical tenants. When this is done the principle is clear. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament: per Lord Buckmaster in *Port of London Authority* v. *Orsett Union Assessment Committee.* (3) If a general statute prevents some or all persons from taking such a hereditament that fact will be taken into account. If it restricts them in the enjoyment of such a hereditament that also will be taken into account. Any similar common law prohibition will have a similar effect."

And as Scrutton L.J. observes (4): "In none of these cases up to the present time has any statutory restriction on the actual rent been considered; all statutory restrictions at present given effect to are on the receipts from the beneficial occupation. Statutory restrictions on the possibility of paying rent have up to the present been disregarded."

(1) [1922] 1 K. B. 51.
(2) [1893] A. C. 562.
(3) [1920] A. C. 273, 305.
(4) [1922] 1 K. B. 48.

I can find nothing in any of the principles to be deduced from the authorities which compels me to disregard the statutory limitations of rent and the consequent limitations on competition amongst hypothetical tenants. On the contrary, the decisions in *Sculcoates Union* v. *Hull Dock Co.* (1) and *Great Western and Metropolitan Ry. Cos.* v. *Kensington Assessment Committee* (2), appear in principle to fully support the conclusion at which I have arrived on the consideration of the two Acts of Parliament.

There is one other matter to which I would like briefly to refer: it is argued that the Rent Restrictions Act, 1920, was not intended to interfere with the system of valuation set up by the Act of 1869. What the intention may have been it is impossible to say, but one can hardly come to the conclusion that where, under the statute, valuation is based upon rent, it was not present to the minds of those who promoted this Act that the valuation might and probably would be affected by statutory limitations as to the rent which a tenant could be asked to pay. That the question of valuation was under consideration is, I think, clear from the provisions contained in sub-s. 9 of s. 12 of the Rent Restriction Act.

I think the appeal should be dismissed.

Order of the Court of Appeal reversed, and appeal allowed. Directed that the second and third questions submitted in the Special Case be answered in the Negative. The respondent to pay the costs in the Court below and the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 20, 1922.

Solicitor for the appellants: *E. J. Marsh.*

Solicitors for the respondent: *Maitland, Peckham, Washington Fox, & Hatten.*

(1) [1895] A. C. 136. (2) [1916] 1 A. C. 23.

Applied. REX *v.* NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL, *Ex parte* SHAW [1951] 1 K. B. 711

[PRIVY COUNCIL.]

J. C.* 1922 *April* 7.

THE KING . . . . . APPELLANT;

AND

NAT BELL LIQUORS, LIMITED . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA AND THE SUPREME COURT OF ALBERTA.

Canada—Certiorari—Summary Conviction—Procedure on Certiorari—Inquiry into Evidence—Provincial Legislative Power—Contemporaneous Acts—Liquor Act (Alberta)—Liquor Export Act (Alberta)—Popular Initiative—Direct Representation Act (Alberta)—"Penalty"—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92—*Supreme Court of Canada—Appellate Jurisdiction—Supreme Court Act* (*R. S. Can.*, 1906, *c.* 139), *s.* 36, *as amended by* 10 *&* 11 *Geo.* 5 (*Dom.*), *c.* 32.

A conviction by a magistrate for a non-indictable offence cannot be quashed on certiorari on the ground that the depositions show that there was no evidence to support the conviction, or that the magistrate has misdirected himself in considering the evidence; absence of evidence does not affect the jurisdiction of the magistrate to try the charge. The provisions of the Criminal Code (R. S. Can., 1906, c. 146), the Liquor Act (Alberta), ss. 62, 63, and the Crown Practice Rules (Alberta), whereby the depositions are to be taken down and placed with the record, and to be returned with the conviction on certiorari, do not prevent the application in Canada of the rule above stated.

Review of the English and Canadian authorities as to the procedure on certiorari.

Reg. v. *Bolton* (1841) 1 Q. B. 66 and *Colonial Bank of Australasia* v. *Willan* (1874) L. R. 5 P. C. 417 approved and followed.

Rex v. *Carter* (1916) 9 Alb. L. R. 481 approved; *Rex* v. *Emery* (1916) 10 Alb. L. R. 139 (so far as it related to non-indictable offences), and *Rex* v. *Hoffman* (1917) 28 Man. R. 7 disapproved.

The Liquor Act (6 Geo. 5, c. 4, Alb.), as amended in 1917 and 1918, is intra vires the legislative power of the Province under the British North America Act, 1867, when read in conjunction with the Liquor Export Act (8 Geo. 5, c. 8, Alb.), whereby rights within the exclusive power of the Dominion are preserved; and it is not ultra vires by reason of being passed pursuant to a popular vote under the Direct Legislation Act (4 Geo. 5, c. 3, Alb.). The provision in s. 80 of the Liquor Act, that liquor kept for sale contrary to s. 23 may be forfeited by a magistrate's order is intra vires, as being for the infliction of a "penalty" within head 15 of the British North America Act, 1867, s. 92. A person

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

can be convicted under s. 23 and his stock of liquor forfeited, although he is carrying on business under the Liquor Export Act.

Judgment of the Supreme Court of Alberta (as to certiorari) reversed.

In s. 36 of the Supreme Court Act (R. S. Can., 1906, c. 139), as amended by 10 & 11 Geo. 5, c. 32 (Dom.), which excepts from the appellate jurisdiction of the Supreme Court of Canada "proceedings for or upon a writ of certiorari arising out of a criminal charge," the word "criminal" is used in contradistinction to "civil," and is not limited to the sense in which "criminal" legislation is reserved exclusively to the Dominion Legislature by s. 91 of the British North America Act, 1867. The Supreme Court of Canada therefore has not jurisdiction to hear an appeal from a decision of the Supreme Court of Alberta upon a motion for a writ of certiorari to quash a conviction for unlawfully keeping liquor for sale contrary to s. 23 of the Liquor Act (Alberta).

Judgment of the Supreme Court of Canada affirmed.

APPEALS by special leave from a judgment of the Supreme Court of Canada (May 10, 1921) dismissing an appeal from a judgment of the Supreme Court of Alberta, Appellate Division (February 12, 1921), for absence of jurisdiction, and from the last-named judgment which affirmed a judgment of Hyndman J.

The respondents were incorporated by Dominion charter in 1917 and did a large business in Edmonton, Alberta, as exporters of liquors; they held a licence under the Liquor Export Act (8 Geo. 5, c. 8, Alb.), as amended, and complied with the requirements of that Act. In 1920 they were convicted before a magistrate at Edmonton "for that they . . . . on October 1, 1920, at Edmonton . . . . did unlawfully keep a quantity of liquor contrary to the Liquor Act and the amendments thereto." Sect. 23 of the Liquor Act, 1916 (6 Geo. 5, c. 4), as amended to 1920, enacts (subject to immaterial provisos): "No person shall, within the Province of Alberta, by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter, or offer to any other person any liquor except as authorized by this Act."

The respondents were convicted upon the evidence of a man employed by the police, who purchased at the respondents' warehouse from their employee twelve bottles of whisky for $45; they were fined $200. By a subsequent order made by the magistrate under s. 80 of the Act the whole of the large

J. C.
1922
REX
v.
NAT BELL LIQUORS, LD.

stock of whisky in the respondents' warehouse at Edmonton was forfeited.

The respondents moved the Supreme Court of Alberta for a writ of certiorari to quash both the conviction and the order for forfeiture. In accordance with the Crown Practice Rules of the Supreme Court of Alberta, the magistrate forwarded to the Court the conviction and order, the evidence taken at the hearing, and all other papers or documents touching the matter. The motions were heard by Hyndman J., who quashed both the conviction and forfeiture order upon a consideration of the evidence. An appeal, by leave, to the Appellate Division was dismissed by Stuart and Beck JJ., Harvey C.J. dissenting. A further appeal to the Supreme Court of Canada was also dismissed, on the ground that the matter was a "criminal cause" within s. 36 of the Supreme Court Act, as amended by 10 & 11 Geo. 5, c. 32, and that consequently the appeal was not competent.

The appeal to the Supreme Court of Alberta, Appellate Division, is reported at 16 Alb. L. R. 149; the grounds upon which the majority of the Court considered that they were entitled to examine the evidence given before the magistrate and to quash the conviction appear (together with the facts and the relevant enactments) from the judgment of the Judicial Committee.

1921. Nov. 21, 22, 24, 25, 28, 29. *S. Woods K.C.* and *Hon. Geoffrey Lawrence* for the appellant.

C. C. McCaul K.C. and *D. N. Pritt* for the respondents.

The arguments sufficiently appear from the judgment of the Judicial Committee. In addition to authorities mentioned in that judgment reference was made on the question of ultra vires to *Canadian Pacific Wine Co.* v. *Tuley* (1); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (2); *Gold Seal, Ld.* v. *Dominion Express Co.* (3); *Toronto*

(1) [1921] 2 A. C. 417.
(2) [1902] A. C. 73.
(3) (1920) 15 Alb. L. R. 377, 389; also 16 Alb. L. R. 113; affd. 62 Can. S. C. R. 424.

Ry. Co. v. *Toronto City* (1); *Attorney-General for Ontario* v. *Attorney-General for Dominion* (2); *In re the Initiative and Referendum Act* (3); and on the question of the procedure on certiorari to Short and Mellor's Crown Office Practice, 2nd ed., p. 47; Paley on Summary Convictions, 8th ed., pp. 145 et seq.; also (as to the earlier practice) to Bacon's Abridgment, tit. "Certiorari" (ed. 1832), vol. ii, p. 16; Burn's Justice of the Peace, tit. "Conviction," 30th ed., vol. i., pp. 1150, 1151; and, amongst other cases thereon, *Ex parte Ransley.* (4)

April 7. The judgment of their Lordships was delivered by

LORD SUMNER. On October 7, 1920, an information was laid at Edmonton, Alberta, against the respondents, Nat Bell Liquors, Ld., before a magistrate of that Province, charging them with unlawfully keeping for sale a quantity of liquor contrary to the Liquor Act, that is to say for sale within the Province. The offence, which is created by the Alberta Liquor Act of 1916, s. 23, is one triable by a Court of summary jurisdiction.

The respondents were convicted and were fined $200. The conviction, which is in the form provided by the Criminal Code (R. S. Can., 1906, amended to 1920), ran, that Nat Bell Liquors, Ld., "is convicted . . . . for that they, the said Nat Bell Liquors, Limited, on the 1st and 2nd days of October, 1920, at Edmonton, did unlawfully keep for sale a quantity of liquor." The quantity of liquor was the whole of the respondents' stock of whisky in the warehouse in question, though only one case of twelve bottles was actually sold. By a subsequent order, dated November 4, 1920, the magistrate declared the whole of it, and the vessels in which it was contained, to be forfeited to the Crown. Nothing turns on the form of this order.

Thereupon the now respondents moved, by way of certiorari, to quash both orders. In accordance with r. 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate returned the conviction and the order of

(1) [1920] A. C. 426.
(2) [1896] A. C. 348, 360, 371.
(3) [1919] A. C. 935.
(4) (1823) 3 Dow. & Ry. 572.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

forfeiture and with them the information and the evidence taken at the hearing in writing, as required by statute. Hyndman J. quashed the convictions, and on appeal his judgment was affirmed by the Supreme Court of Alberta (Harvey C.J. dissenting).

The appellant then appealed to the Supreme Court of Canada, which dismissed the appeal formally, affirming without reasons given the Registrar's decision that any appeal was incompetent, the proceedings having been "on a criminal charge" within the meaning of the Supreme Court Act. Against this decision an appeal has been taken to their Lordships' Board, but it has become of minor importance, seeing that, by special leave subsequently granted by His Majesty in Council, an appeal has been lodged against the decision of the Supreme Court of Alberta, quashing the conviction and the order for forfeiture, and this is the principal matter now to be decided.

Both before Hyndman J. and before the Supreme Court of Alberta the evidence was elaborately examined and weighed. The judgments both set out its general effect and frequently quote it in extenso, and it will be convenient, in order to explain what follows, to summarise them.

Nat Bell Liquors, Ld., were incorporated by Dominion charter in 1917, and did a very large business in Edmonton as exporters of liquor. They held a licence from the Attorney-General of Alberta under the Export Liquor Act and its amendments and complied with the requirements of that Act. The officers of the company in control of the business were Nathan Bell and W. Sugarman. They had a warehouse, fully stocked, from which liquor was despatched for export in accordance with orders received, and their warehouseman, one Angel, was strictly commanded by his superiors to have nothing to do with any local sale or delivery, but to observe carefully all the provisions of the Liquor Act.

The police determined to test the business actually done by the respondents. They employed for this purpose, as a temporary detective-constable and agent provocateur, a man named Bolsing, who posed as a working carpenter and was

provided by the police with a sum of marked money. He was a man who had been convicted some time before of stealing beer, and when cross-examined about it he unsuccessfully denied the conviction. He went to the respondents' warehouse, asked for and saw Angel, and after interviews on three successive days, succeeded in inducing him to sell him for $45 twelve bottles of whisky, which were given to him and taken away. Either Bell or Sugarman saw him on the premises before the final day, but he was not proved to have then known what he was about. When Bolsing paid the money to Angel, Bell and Sugarman were in another part of the room, though not within earshot, nor did they see the bottles given to him, but he swore that Angel then and there gave the money to them, saying "Here's $45 more." This they denied, as did a girl typist, who was also present. It was common ground that Angel did sell his employers' whisky and took the money, but the defendants' evidence was that he gave the money to a man named Morris Rosenberg, to keep for him. Bolsing also swore that he was allowed to select the case out of the entire stock, and to buy whichever whisky he liked. Hyndman J. records the fact that it was not clear whether or not Angel was still in the respondents' employment at the time of the hearing. He was, at any rate, doing work for them at the warehouse after his misconduct had become known, and was not shown to have ever been definitely discharged.

Of the numerous contentions raised by the respondents, those which logically come first, though not the most fully argued, relate to the validity of the provision as to forfeiture, and indeed of the whole Act, as it stood at the time of the conviction. It appears that the Liquor Act was passed in 1916 under the following circumstances. In the previous year, pursuant to s. 6 of the Direct Legislation Act, an initiative petition was duly presented to the Legislative Assembly of Alberta, praying that a Bill which was identical in all material respects with the Liquor Act should be enacted. Thereupon, as the Act requires, the Bill was presented to the people of Alberta to be voted on, and, having been passed by

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

a considerable majority, was passed by the Legislature without substantial alteration. The respondents contend that the Liquor Act is ultra vires, because, even if it related to matters named in s. 92 of the British North America Act, regarding which a Provincial Legislature is "exclusively" empowered to make laws, still it was not "exclusively" made by the Legislature, but partly also by the people of Alberta. Indeed, the part played in the matter by the Legislature was practically only formal. It was further argued that the Direct Legislation Act was itself ultra vires upon the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the Provincial legislative power in a Legislature, consisting of His Majesty, as represented by the Lieutenant-Governor, and of two Houses, or in some Provinces one House, and introduced into it a further and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory Legislature must pass, whether it really assents to it or not. On the first point it is clear that the word "exclusively" in s. 92 of the British North America Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. A law is made by the Provincial Legislature when it has been passed in accordance with the regular procedure of the House or Houses, and has received the royal assent duly signified by the Lieutenant-Governor on behalf of His Majesty. Such was the case with the Act in question. It is impossible to say that it was not an Act of the Legislature and it is none the less a statute because it was the statutory duty of the Legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables

a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the Legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but is incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the Legislature and of its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the Legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be ultra vires. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.

The Liquor Act, as passed in 1916, contained sections obviously designed to save it from offending against the provisions of the British North America Act. These sections were numbered 27 and 72, and they provided as follows: "27. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complies with requirements in sub-s. 1 hereof mentioned or from selling from such liquor warehouse to persons in other provinces or in foreign countries or to a vendor under this Act. 72. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta except as specially provided by this Act and restrict the consumption of liquor within the limits of the Province of Alberta, it shall not affect and is not intended to affect bona fide transactions in liquor between a person in the Province of Alberta and a person in another Province or

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

in a foreign country, and the provisions of this Act shall be construed accordingly."

Since then the Liquor Act has been repeatedly amended. In 1917 among other amendments s. 27 was repealed and s. 72 in 1918. Accordingly the Act now reads: "No person shall within the Province of Alberta . . . . keep for sale . . . . any liquor except as authorized by this Act" (s. 23), and there is nothing in this Act itself, which authorizes a liquor exporting business to be carried on or the keeping of liquor for export to persons in other Provinces or in foreign countries. The question now raised is whether the Act is now within the competence of the Provincial Legislature, containing as it does no disclaimer of any operation affecting such a business, but on the contrary expressly forbidding the keeping of liquor for sale in terms of such generality as would make the prohibition apply to such a business.

In their Lordships' opinion the real question is whether the Legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the Provincial Legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as s. 72 as to make its presence or absence in an enactment crucial. As to the other section repealed in 1918, it is of capital importance to note that on April 13, 1918, the day on which the amending statute, which effected this repeal, received the royal assent, that assent was also given to another statute of the Legislature of Alberta, the Liquor Export Act, which under conditions not at the moment material legalized the export of liquor, and authorized liquor to be kept in the Province of Alberta for the purpose of such a trade. In their Lordships' opinion the Liquor Act as amended in 1918 must be taken to authorize by implication that which the Legislature, simultaneously and almost uno flatu, authorizes in express terms by another statute directed to

that very matter. It is an inconvenient mode of drafting, provocative of doubts and not without considerable peril to the Act in question, to use terms in the Liquor Act which either import a recognition of another Act without any mention of it, or expressly annul while professing to ignore it. The dilemma is this. When the Legislature passed these two Acts, which became law on the same day, did it intend by a simple repeal expressed in the one to stultify all its work expressed in the other, which is what the literal reading of its language leads to, or did it intend to imply the words " or by the Liquor Export Act " after the words " this Act " in s. 23 of the Liquor Act, and so effect a saving exception, which a literal construction of its language clearly negatives ? On the principle " Ut res magis valeat quam pereat," their Lordships think that in this Act and in these circumstances the latter alternative is the one to be adopted, but they would be loth to apply this precedent in any other than an exactly similar case.

There are some other sections in the Liquor Act, certainly of a stringent character, which the respondents contended to be generally ultra vires. Some of these may be dismissed from consideration now as not imperilling the validity of the Act at large and not affecting the particular offence charged and the particular proceedings taken in this case. Such are s. 78, which makes it an offence to publish any letter referring to any intoxicating liquor or giving the name of any person manufacturing intoxicating liquor ; s. 79, which authorizes a magistrate to arrest the occupant of any premises on which, under his search warrant, there has been found any liquor unlawfully kept ; and s. 80, under which the owner of any liquor may be summoned before a magistrate, whereupon, if it be found to be his liquor, he is to suffer forfeiture of it, unless he shows that he did not intend it to be sold or kept for sale in violation of the Act. Their Lordships do not think that if the Act is otherwise within the competence of the Legislature the inclusion of any of these provisions, remarkable as they are, makes it ultra vires as a whole. It is not an interference with s. 121 of the British North America Act, for

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

the word "free," applied to admission into a Province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight with which the Legislature lays its hand on those who violate its statutes. These sections appear to be susceptible of being read and should be read as merely dealing with matters of a local nature in the Province and particularly with the steps by which competent legislation is to be enforced there. One of these provisions, however, is separately challenged. It is that which affects the order forfeiting the respondents' stock of whisky. It is contended that the forfeiture provided in s. 80 is ultra vires, because the powers of the Provincial Legislature are only those given in head 15 of s. 92 of the British North America Act—namely, "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province." It is true that this head does not name a forfeiture, but their Lordships think that it is covered by the word "penalty." The word is not defined in the Act. No doubt the commonest form of penalty is a money penalty, but as that is already dealt with in its most obvious form by the antecedent word "fine," their Lordships are not prepared to put so limited an interpretation on the word "penalty" as would rob the Provincial Legislature of the power, for example, of depriving an illegal vendor of poisons of his stock in trade and would leave it to him ready for further operations on his release from gaol.

The respondents then contended that, if they were within the Liquor Export Act by reason of the business which they carried on, and if they had complied with the provisions and formalities of that Act, they must ipso facto be outside the Liquor Act altogether, so that the presumption arising under that Act from the possession of liquor would not affect them, and the lawfulness of their possession and of their purpose under the Liquor Export Act would, of itself, defeat any

charge under the Liquor Act. The contention seems to their Lordships to be unfounded and not even easy to understand. Neither Act contains any provision excluding everything, which comes within the purview of the Liquor Export Act, from the operation of the Liquor Act. Presumably full effect must be given to the provisions of both. No doubt what the Liquor Export Act expressly legalises cannot be made an offence under the Liquor Act, for it cannot be supposed that, by similar and simultaneous enactments, the Legislature meant to contradict itself, but beyond this the matter cannot go. It is not necessary to examine the effect which compliance with the Liquor Export Act would have on the presumption raised by the Liquor Act, or to ask whether it would conclusively rebut the presumption or only have the effect of shifting the burden of proof, for these are matters relating to the weighing of evidence and do not arise on certiorari.

Coming to the proceedings taken in this case, it is necessary at the outset to appreciate the general character and scheme of the Liquor Act and its relation to the Canadian Criminal Code. The expression "liquor," as used in the Liquor Act, includes "all fermented spirituous and malt liquors and all liquors which are intoxicating, and any liquor which contains more than 2½ per cent. of proof spirits shall be conclusively deemed to be intoxicating" (s. 2 (*c*)), and it is important to realize that every one who is in possession of "liquor" is presumably a criminal, and is liable to be sent to gaol (s. 54).

Certain persons, such as chemists and clergymen in respect of liquor kept for dispensing and eucharistic purposes, and certain small quantities of liquor kept in a private house, are exempted from this criminality, and a distinction is made between possession for sale and possession in a private dwelling house, but generally the provisions are as follows:—

"Sect. 23. No person shall within the Province of Alberta by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter or offer to any other person any liquor except as authorized by this Act.

J. C.
1922
REX
v.
NAT BELL LIQUORS, LD.

"Sect. 24. No person within the Province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever other than in the private dwelling-house in which he resides except as authorized by this Act.

"Sect. 24A. No person within the Province of Alberta shall have or keep in his private dwelling-house a quantity of liquor exceeding one quart of spirituous liquor and two gallons of malt liquor.

"Sect. 54. If in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, prima facie proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

At the hearing of the summons the Attorney-General does not appear to have taken full advantage of the statutory presumption, contained in s. 54, for, instead of simply proving that Nat Bell Liquors, Ld., had in their possession the liquors to which the charge referred, and leaving it to them to rebut the presumption of guilt thereon arising, he went into the case from the outset, as if the ordinary burden of proof rested on the prosecution. Probably this was the more convenient course under the circumstances of the case, but the result may be that, if the question whether there was evidence to convict can be raised at all, the time, at which it arose, was the conclusion of the case for the Crown, and that the statutory presumption should not be regarded as making good defects, if otherwise established, in a prosecution in which the Crown had voluntarily undertaken the affirmative. At any rate, the effect of s. 54 is made less of by the learned judges than might perhaps have been expected, and, after the course which the case has taken, it would be unsatisfactory to dispose of the matter by simply saying that the Court did not accept the defendants' evidence on an issue upon which the burden of proof lay upon them. It will be convenient to state at

the outset that none of the ordinary grounds for certiorari, such as informality disclosed on the face of the proceedings, or want of qualification in the justices who acted, are to be found in the present case. The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so. There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete.

In the superior Courts the proceedings in the Court below were kept throughout in the forefront of the case, sometimes in the form of asking what evidence the Court was entitled to consider, sometimes in the form of considering its sufficiency and effect. The real question, though it might present itself as one of evidence, was one of the jurisdiction of the superior Court on certiorari. Hyndman J. cited from *Rex* v. *Covert* (1) a series of rules which, rightly or wrongly, purport to lay down the conditions under which alone a judge of fact can refuse to accept, that is to say, to believe evidence given before him, and, after elaborately examining the evidence, concludes by saying: "Looking at the whole case I am of opinion that the evidence of the defence meets, as squarely and satisfactorily as can reasonably be expected, the presumption raised against the defendants by the evidence for the Crown, and that it fulfils the requirements set forth in the judgment in *Rex* v. *Covert* (1) and that consequently the magistrate should have accepted such denials and explanations."

On appeal Stuart J., while declining to discuss *Rex* v. *Covert* (1), said: "After reading the reasons the justice gave for convicting" (which were neither part of the formal conviction nor part of the depositions), "I cannot discover that he kept in mind, as he should have kept in mind, his duty

(1) (1916) 10 Alb. L. R. 349.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

to receive a spy's evidence with caution, or that he even remembered the untruths in the spy's evidence to which I have referred. . . . . It was so easy for Bolsing to add the one circumstance to his story " (that was his statement about " $45 more ") " which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost, if not quite, sufficient of itself in my opinion to justify the quashing of the conviction. . . . . If the use of the little word ' more ' by Bolsing is adverted to, I must reply that that is too slight a cord upon which to hang anything, and in addition to the interest of the witness using the expression, and the obvious advantage of adding it, even the word itself is open to other interpretations. If I had been engaged with a jury on the trial of this case, I should undoubtedly have withdrawn it from their consideration on this latter ground at least."

Thereafter Beck J., after laying down as a principle " that the Court has the right and the duty, in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals, to examine the entire proceedings certified to it, and to deal finally with the case according to right and justice," proceeded to examine the statements of the witnesses, dwelt on the fact that Bolsing was an accessory and was uncorroborated, and said : " Had the charge been one not of keeping for sale but even for the lesser offence of selling, it seems clear to me that, had the case been before a judge and a jury, the judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt, and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence . . . . in which event the verdict would have been undoubtedly set aside."

It appears to their Lordships that, whether consciously or not, these learned judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act

nor under the general law of certiorari was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of certiorari, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.

The reasons, expressed or implied, which in the view of the learned judges warranted the Court in quashing this conviction appear to have been the following: (1.) Without Bolsing there was no evidence of the commission of the offence by the accused company, and his evidence was no evidence, since he was an accessory before the fact and was uncorroborated; (2.) it was not evidence on which a jury could safely convict, and ought therefore to be treated as no evidence at all; (3.) want of evidence or of sufficient evidence makes the conviction one pronounced without jurisdiction; (4.) such want of jurisdiction can be established by evidence dehors what is set out on or forms part of the record of the conviction; (5.) in any case, by the statute law of Alberta the depositions are part of the record, or can be examined on certiorari as if they were part of the record; and finally, (6.) in Alberta, at any rate in connection with cases arising under the Liquor Act, the superior Court can do more than could be done on certiorari by the High Court of Justice in England, and can, as matter of law, review the whole proceedings to see that justice has been done.

Their Lordships think that of these contentions the first and second may be shortly disposed of. They have not been referred to any decisive authority which applies to certiorari the same considerations as apply to testing a jury's verdict, when challenged on a motion for a new trial or on an appeal; nor, apart from a few expressions, here and there, not very carefully considered, can any judicial dicta be found to support it. Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could find on it otherwise than in one way, whether the evidence was such that a jury could safely convict upon it, and whether it was such that a Court of

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

criminal appeal should refuse to interfere with the conviction, are questions which, though fully argued, have no relation to the functions of a superior Court on certiorari. They all imply that there was evidence, but not much; they all ask whether that little evidence was enough; they are all applied to a body of men who are not the absolute judges of fact, but only judges whose decision may, though rarely, be disturbed. On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: "If indeed there had been any evidence whatever, however slight, to establish this point," said Lord Kenyon in *Rex* v. *Smith* (1), "and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion; for the magistrate is the sole judge of the weight of the evidence. And for this reason I think there is no foundation for the first objection . . . . There was some evidence from which he might draw the conclusion."

The majority in the Supreme Court of Alberta appear to have accepted this principle, but to have thought that it might be met by inquiring whether the justices had misdirected themselves as to the law of evidence, under which term they sought to include a failure to give sufficient or any weight to features in the evidence which appeared to them to be of preponderating importance. It may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below, but none of the objections taken here show that the magistrate acted under any misapprehension of the law. Their Lordships, beyond pointing out the fact, will not stay to consider that the charge was a charge of keeping the liquor for an unlawful purpose, to which Bolsing was not an accessory, and not one of selling it, to which he was. Assuming that Bolsing was an accessory, still he was a competent witness. If he impressed the justice as a witness

(1) (1800) 8 T. R. 588, 590.

of truth, no error in law was committed in believing him even without corroboration, but only an error of judgment. Corroboration, however, there was in fact on the point about the money so much adverted to, for, as Hyndman J. points out (though he fails to see the significance of it), Angel, who on the case for the defence had disobeyed his orders in the most serious way and had disposed of his masters' whisky for his own profit, was still at the time of the hearing acting as their employee, a circumstance tending to show that what he had done was not really a piece of flagrant disobedience and roguery but a thing within the scope of his duties, though unfortunately unsuccessful. The weight of this was for the magistrate, and was, if he so chose to regard it, some corroboration of Bolsing's tale.

Passing from considerations of the weight of the evidence, we come to the questions whether there was any evidence, and what materials are to be looked at in order to answer that question, and further what effect a decision that on some essential point evidence was completely lacking would have on the jurisdiction respectively of the magistrates and the superior Court. In the different Provinces of Canada there has, from time to time, been much diversity of view as to the powers and duties of the superior Court on certiorari. Though the principles laid down in *Reg.* v. *Bolton* (1) and the *Colonial Bank of Australasia* v. *Willan* (2) have been accepted in Ontario, the attempt to distinguish them, as Stuart and Beck JJ. distinguished them in the present case, was made at any rate as long ago as 1883: *Reg.* v. *Wallace* (3), per Cameron J. dissentientem. The Courts of Ontario have considered themselves free and even bound, under the legislation applicable, to examine the evidence returned by the inferior Court and to inquire whether the justices had before them any evidence of an offence, such as was within their jurisdiction, though they have uniformly purported to recognize that the weight and credibility of it, when given, were entirely for the justices. There has been considerable

(1) 1 Q. B. 66. (2) L. R. 5 P. C. 417.
(3) (1883) 4 Ont. R. 127, 141.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

diversity in the language used. Sometimes the question has been whether there was "any sufficient evidence of the offence": *Reg.* v. *Wallace* (1); sometimes whether there was "any evidence of an offence": *Reg.* v. *Coulson*, No. 1 (2), and *Reg.* v. *Coulson*, No. 2 (3); sometimes whether there was "reasonable" evidence to support the conviction: *Rex* v. *Borin* (4); but the general view has been that, if there is some evidence, there is jurisdiction to hear and determine, and thereafter the superior Court will not interfere: *Rex* v. *Reinhardt* (5); *Rex* v. *Cantin* (6); *Rex* v. *Thompson*. (7) The Courts of New Brunswick and Nova Scotia have decided that want of evidence is not a ground for quashing a conviction, and in *Hawes* v. *Hart* (8) and *Reg.* v. *Walsh* (9), the authorities are collected.

In Manitoba, Saskatchewan and Alberta a different view has asserted itself, though not without much difference of opinion. In *Rex* v. *Pudwell* (10) Hyndman J. adopted the regular view of *Willan's Case* (11), and refused to quash a conviction, where the charge was within the jurisdiction and the proceedings were regular on the face of them. Later on in 1916, in the case of *Rex* v. *Carter* (12) Harvey C.J. laid it down, after a full and careful examination of the authorities, that, if a conviction is valid on its face, absence of evidence to support a conviction is not a ground for quashing it, but in the main two decisions, *Rex* v. *Emery* (13) in Alberta, and *Rex* v. *Hoffman* (14) in Manitoba, have caused the view to prevail in those Provinces and in Saskatchewan which was applied in the present appeal, and has also been followed in Quebec: *Lacasse* v. *Fortier*. (15) The practical effect of those decisions is that not only is the superior Court not precluded from examining the evidence given in the Court below or confined

(1) 4 Ont. R. 127, 141.
(2) (1893) 24 Ont. R. 246.
(3) (1896) 27 Ont. R. 59.
(4) (1913) 29 Ont. L. R. 584.
(5) (1917) 11 Ont. W. N. 346.
(6) (1917) Ibid. 435.
(7) (1917) 39 Ont. L. R. 108.
(8) (1885) 18 Nov. Scot. R. 42.
(9) (1897) 29 Nov. Scot. R. 521.
(10) (1916) 10 West. W. R. 205.
(11) L. R. 5 P. C. 417.
(12) (1916) 9 Alb. L. R. 481.
(13) (1916) 10 Alb. L. R. 139.
(14) (1917) 28 Man. R. 7.
(15) (1917) 30 Can. Crim. Cases, 87.

to ascertaining, as a point going to the jurisdiction of the magistrate, whether he had before him some evidence supporting his conviction, but it is free to range over the whole evidence and to subject it to criticism. This conclusion is arrived at by holding that legislation which requires that depositions shall be taken in writing, and a rule which requires them to be transmitted with the conviction on making a return to an order for certiorari, in effect make them part of the record for all purposes. This of course is a question of particular statutory practice and not of the general law. The decisions, however, go on to hold that, although in general the credibility and weight of the evidence is for the magistrate, the Superior Court can, as a matter of law, consider whether he guided himself by a right view of the credibility of particular evidence, and it is plain that a practice to review the whole of the depositions, however the purpose of it is expressed, leads very easily to the conclusion that a conviction may be quashed, not so much because no witness has sworn to the particular facts required to make out a case for the prosecution, as because, on balancing it against the evidence given for the defendant, the great preponderance is thought to be on his side. This practice of examining the evidence, though of many years' standing before the present case, has been stated in the Manitoba and Alberta decisions as having objects which vary considerably. The Court would not quash, it has been said, if there was evidence to go to a jury: *Reg.* v. *Grannis.* (1) There must be evidence which the Court can see may reasonably support the conviction. Whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial is, when set out on the face of a conviction, adequate to sustain it: *Reg.* v. *Davidson.* (2) The Court can only quash if there is a complete absence of any evidence whatever of the commission of the offence: *Reg.* v. *Herrell.* (3) The Court examines the evidence to ascertain, not whether the tribunal reached the proper

(1) (1887) 5 Man. R. 153. (2) (1892) 8 Man. R. 325.
(3) (1898) 12 Man. R. 198.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

conclusion on the evidence, but whether there was any evidence upon which the tribunal could properly find as it did: *Rex* v. *Emery*. (1)

In the present case Stuart J. says of the position occupied by the magistrate: "He was not merely standing in the place of a jury. He was also a judge, with the duty of applying in his own mind sound legal principles in the consideration and the weighing of evidence. . . . . It is not acting at all on appeal on the facts to say that the magistrate misdirected himself in his duty as a judicial officer in failing to take into account the true character of the evidence of the prosecution on a crucial point. Particularly is this so when the magistrate knew that his decision against the accused was without appeal and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. . . . . What I have said has no relation whatever to the questions discussed in *Rex* v. *Covert*." (2)

Beck J. states the matter with equal breadth, though in a somewhat different way: "This Appellate Division held in *Rex* v. *Emery* (1), that the Court is entitled upon certiorari —at least in cases where certiorari is not taken away—to look at the evidence given before the convicting magistrate, to ascertain whether or not it is sufficient to sustain the conviction, and if it is not, to quash the conviction. . . . . This view seems now to be that adopted in all the Provinces of Canada. . . . . I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seems at the present day to have become settled throughout Canada beyond reversal. . . . . The right and duty, therefore, of this Court to consider the evidence upon which a conviction is made, and if it is found to be insufficient, to quash the conviction, is then at least equal to the right and duty of the Court to set aside a verdict in a criminal case upon a case reserved, if it appears that the evidence is insufficient to support the

(1) 10 Alb. L. R. 139. (2) 10 Alb. L. R. 349.

conviction. The cases, therefore, in which upon a reserved case the Court has set aside a conviction for insufficiency of evidence, are therefore authorities applicable to cases arising on certiorari . . . . but, as I shall endeavour to show, the power of the Court to set aside a conviction on certiorari is much greater than its power upon a reserved case."

Rex v. *Emery* (1) was a case to which both Stuart and Beck JJ. had been parties, and, in a measure, the present case may be said to be an appeal against it. In argument, however, it has been pointed out that *Rex* v. *Emery* (1) was a case of summary trial of an indictable offence, whereas the present is a case of the determination by a Court of summary jurisdiction of an offence cognizable only by such a Court. In what their Lordships have to say of *Rex* v. *Emery* (1) they wish to keep open this distinction, if it be one, for consideration, if a case of an indictable offence should hereafter come before them, but, in so far as both cases are on all fours, *Emery's Case* must be examined.

The proposition adopted may be stated thus: in exercising its inherent jurisdiction to supervise the proceedings of an inferior Court, the superior Court must inquire whether there was any evidence on which the tribunal below could have decided as it did decide, and this involves examining the evidence given to see if it was sufficient in this sense to sustain the conviction. If, on some part of the case, which was material to the charge and had to be legitimately established before the accused person could be convicted, no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the superior Court would oblige it to quash the conviction. For this reliance was placed on *Rex* v. *Smith* (2); *Rex* v. *Crisp* (3); and *Rex* v. *Chandler* (4); *Ex parte Vaughan* (5); and *Lovesy* v. *Stallard*. (6)

It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete

(1) 10 Alb. L. R. 139.
(2) 8 T. R. 588.
(3) (1806) 7 East, 389.
(4) (1811) 14 East, 267.
(5) (1866) L. R. 2 Q. B. 114.
(6) (1874) 30 L. T. 792.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

absence of any testimony on a definite and essential point, and complete presentation to the superior Court of this omission in the Court below. Only if the whole evidence given can be got before the superior Court can this difficulty be raised. Only when it appears that no witness whatever has said a thing that must be said by some one will it fall to be discussed. It will have two aspects: the first, whether the omission from the record of any statement that the necessary piece of evidence was given raises the presumption, that it must nevertheless have been given or the justices would not have convicted, or the presumption that, as it was not stated, it cannot have been given at all, or whether, at any rate, it shows that the record is in need of further and fuller statement; and the second, whether pronouncing a conviction, notwithstanding such an absence of necessary proof, is an error of law or a mistake in fact. More generally speaking, it becomes necessary to ask, what is the "record" and when can the superior Court go outside it, and, if want of evidence can be established, does that establish want of jurisdiction in the magistrate?

When justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. In taking this course in *Rex* v. *Warnford* (1) Abbott C.J. says: "The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The Court will not assume that the justice has done his duty unless he tells us so by his own acts." On the other hand, if legislation has provided for a shorthand note of the whole of the evidence and for its attachment to the conviction as a part of it, when returned on certiorari, the record itself shows, when it reaches the superior Court, whether or no the evidence in question was given. It seems to have been by no means settled on authority that, even when the evidence eventually reaches the Court in a complete

(1) (1825) 5 Dow. & Ry. 489, 490.

form, the Court should criticise the absence of the material evidence as error in law, and as ground for quashing the conviction. In *Ex parte Vaughan* (1), Shee J., alone of the judges who expressed opinions, dealt with the case of there being no evidence at all on which justices could adjudicate, but all he says is that then "they would be acting improperly." Lord Coleridge in *Lovesy* v. *Stallard* (2) says generally that "the existence of evidence is for the Court." On the other hand, in *Rex* v. *Galway Justices* (3), Palles C.B. points out that a conviction which sets out no evidence cannot be questioned as to the evidence given before the justices on material dehors the conviction. In *Reg.* v. *Cheshire Justices* (4), it actually appeared on the affidavits filed on the question of the justices' jurisdiction, that, in making their order, they had acted on a view of the facts not testified to at all, but merely stated to them by one of their own body as being within his knowledge. The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. Though one member of the Court said that the justices had decided "absurdly," they refused to criticise the decision further. "This," said Lord Denman, "we cannot look into."

It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has

(1) L. R. 2 Q. B. 114, 118.
(2) 30 L. T. 792, 794.
(3) [1906] 2 I. R. 446.
(4) (1838) 8 Ad. & E. 398, 403.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was coram non judice. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *Rex* v. *Mahony*. (1) On this point *Ex parte Hopwood* (2) may also be referred to. In that case certiorari having been taken away by statute, the Court could only interfere if the justices had convicted without having any jurisdiction at all. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The Court held that, even so, the fact did not take away jurisdiction. "As to the want of evidence on matter of fact," says Patteson J., "that cannot possibly take away jurisdiction; no case can be cited where that has ever been said. (3)" To the same effect is *In re Shropshire Justices*. (4) Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected. Thus, in the well-known case of *Brittain* v. *Kinnaird* (5), the plaintiff had been convicted under the Bumboat Act, and the conviction stated his offence in terms of the Act simply, "for that he had unlawfully in his possession in a certain boat certain stores," very much as the conviction runs in this case. He

(1) [1910] 2 I. R. 695.
(2) (1850) 15 Q. B. 121.
(3) (1850) 15 Q. B. 128.
(4) (1866) 14 L. T. 598.
(5) (1819) 1 Brod. & B. 432.

said that his vessel was of 13 tons burthen and was not a boat, and sued the justice; but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate.

In *Reg.* v. *Bolton* (1) Lord Denman, in a well-known passage, says: "The case to be supposed is one . . . . in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do . . . . is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. . . . . Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction. . . . . But, as in this latest case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. . . . . But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible,

(1) 1 Q. B. 66, 72 et seq.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction. . . . . The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

The law laid down in *Reg.* v. *Bolton* (1) has never since been seriously disputed in England. In *Colonial Bank of Australasia* v. *Willan* (2) the Judicial Committee settled that the same rules are applicable to the Dominions, except in so far as they may be affected by competent legislation. The respondents must, therefore, distinguish these authorities, since, where they apply, it is not now possible to argue that they were not rightly decided, or else they must show special legislation applicable in Alberta. *Willan's Case* (2) is said to be distinguishable on two grounds, first, that it was not, nor was *Bolton's Case* (1), a criminal case; and, secondly, because Sir James Colvile's language shows the decision to have turned on the Committee's being satisfied, from the evidence before it, that the material allegations had been proved by evidence given in the Court below. If so, both cases were merely decisions on the admissibility upon certiorari of fresh affidavit evidence to impugn or to confirm the regularity of the proceedings below, as returned to the superior Court.

There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on certiorari before a superior Court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of certiorari shows that no such difference exists. The object is to examine the proceedings in the inferior Court

(1) 1 Q. B. 66. (2) L. R. 5 P. C. 417.

to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of Lord Cairns in *Walsall Overseers* v. *London and North Western Ry. Co.* (1) The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule nisi for a certiorari to quash an order of Quarter Sessions in a rating matter. Lord Cairns, speaking of certiorari generally, said: "If there was upon the face of the order of the Court of Quarter Sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the Court found error upon the face of it, to put an end to its existence by quashing it." He then turned to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the Sessions were bound to set out on the face of their order, he proceeded to point out that the statement of what had led to the decision of the Court made the order "not an unspeaking or unintelligible order," but a speaking one, and an order which on certiorari could be criticised as one which told its own story, and which for error could accordingly be quashed.

It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior Court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that,

(1) (1878) 4 App. Cas. 30, 39.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. That the superior Court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

The view taken in the Supreme Court of Alberta of the real grounds for the decision in the *Colonial Bank of Australasia* v. *Willan* (1) proceeds on a complete misapprehension. In that case Sir James Colvile said of the order, which had been wrongly quashed: "The order, then, was one made by a competent judge; showing, on the face of it, that every requirement of the statute under which it was made had been complied with; . . . . and containing an express adjudication upon a fact which, though essential to the order, the judge was both competent and bound to decide—viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt. This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court." (2)

Commenting on this passage Beck J., in *Rex* v. *Emery* (3),

(1) L. R. 5 P. C. 417. (2) Ibid. 446. (3) 10 Alb. L. R. 139.

expresses the opinion that what the Judicial Committee condemned, and all that it condemned, was a retrial of the existence of the debt by the superior Court on fresh evidence, which had not been adduced below; and in *Rex* v. *Hoffman* (1), which adopted the reasoning and conclusions of *Rex* v. *Emery* (2) in the following year, it is said that all that was decided in *Willan's Case* (3) was the question of the admissibility of fresh evidence by affidavit in the superior Court, which had not been before the justices in the Court below. All this seems to have hung on Sir James Colvile's commencement of a new paragraph and a new step in the reasoning with the words "this being so." This was taken not as comprehending all that had preceded, but as relating solely to the sentence beginning "Nor can it be said that there was no evidence . . . ." The report shows that no such point was taken by Mr. Benjamin for the respondents. His argument was that the proceedings were heard ex parte, for the company did not appear on the winding-up petition; but that the winding-up judge had assumed the preliminary question—namely, whether or not there was a creditor before the Court—to have been conceded in consequence of the absence of controversy; that in the result he had established his jurisdiction by proceeding upon an assumed fact; and that the reality of that assumption having been inquired into in the superior Court on affidavit as to the fact, since questions going to the jurisdiction of the Court below must in case of need be inquired into, and it having been found that in fact no petitioning creditor existed, the order was rightly quashed. (4) The passage above relied on is the answer to this argument, which is briefly dismissed at the end of the main conclusion by recalling that the judge had uncontradicted affidavit evidence of the existence of the debt before him, and found and recited the existence of the debt, and in doing so was examining into the reality of an alleged fact, which it was within his competence to decide, although, had the alleged fact been found to be untrue, he

(1) 28 Man. R. 7.
(2) 10 Alb. L. R. 139.
(3) L. R. 5 P. C. 417.
(4) Ibid. 443, 444.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

would have been bound to dismiss the petition to wind up the company.

This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court which it is within the competence of that Court to inquire into and to determine, and facts essential thereto which are only within the competence of the superior Court. As Lord Esher points out in *Reg.* v. *Income Tax Commissioners* (1), if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard. The following is a real instance of this. In an anonymous case reported in 1 B. & Ad. 382, justices who had jurisdiction to hear a charge of common assault were precluded by statute from exercising it, if the evidence disclosed that the assault was accompanied by an attempt at felony. Although such an attempt was deposed to in the course of the evidence supporting the charge of assault, a rule to quash a conviction for a common assault was discharged upon the ground, that it was for the justices to decide whether they believed the part of the evidence which disclosed the attempt, and if they did not their jurisdiction to convict was not ousted by the statute. In the language of Coleridge J., delivering the judgment of the Court in *Bunbury* v. *Fuller* (2), the rule is thus stated: "No Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its

(1) (1888) 21 Q. B. D. 313, 319. (2) (1853) 9 Ex. 111, 140.

jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court."

In addition, however, to this mistaken attempt to place the decisions in *Reg.* v. *Bolton* (1) and in *Willan's Case* (2) on a too limited ground the majority of the Supreme Court of Alberta acted on a view of the English legislation of 1848, which without foundation is deemed to differentiate the law of certiorari in England and in Canada.

The learned judges appear to have thought that the application of these cases depends on the effect in England of the Summary Jurisdiction Act of 1848 (11 & 12 Vict. c. 43); that the law applicable in Canada is the law as it was in England before 1848, and not the law as it had stood ever since, and that under the earlier law the superior Court on certiorari was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices. Their Lordships think that there has been a mistake on both points.

Reg. v. *Bolton* (1), undoubtedly, is a landmark in the history of certiorari, for it summarises in an impeccable form the principles of its application under the régime created by what are called Jervis's Acts, but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer: it was the inscrutable face of a sphinx.

Long before Jervis's Acts statutes had been passed which

(1) 1 Q. B. 66. (2) L. R. 5 P. C. 417.

J. C.
1922
REX
v.
NAT BELL LIQUORS, LD.

created an inferior Court, and declared its decisions to be "final" and "without appeal," and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and Provincial, when regulating the rights of certiorari and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure without unduly ousting the supervisory jurisdiction of the superior Court.

The matter has often been discussed as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biased, or were interested in the subject matter? On the other hand, to show error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case. If the superior Court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected. The Summary Jurisdiction Act cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face. The superior Court acquired no new and more extensive right to admit fresh evidence by affidavit or to contradict the record of the conviction by matter dehors its

contents. When it would previously have been confined to matter appearing on the face of the record, it continued to be so confined, but the grounds for quashing on certiorari came in practice to be grounds relating to competence and disqualification.

It follows that there is not one law of certiorari before 1848 and another after it, nor one law of certiorari for England and another for Canada. The real questions are: (1.) has any statute, having force in Alberta, prescribed a form of conviction which omits all evidence from the record and leaves nothing but the statement that the accused was duly convicted to take its place; and (2.) has any other such statute modified the practical effect of that provision, which, of course, must otherwise be the same for Canada as for England?

The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day. Even before the British North America Act was passed, legislation had been enacted in Canada prescribing a general form of conviction for offences within the competence of a summary jurisdiction. That form was in substance the form prescribed in the English Act of 1848, the form now in force under the Criminal Code of Canada, and the form in which the conviction in the present case was expressed. Special Canadian legislation has long dealt with the subject of temperance and restricted or prohibited the sale of intoxicants, and Alberta, too, has for many years enacted strict measures of her own, the present Liquor Act being the last result of much amendment and reamendment of the earlier steps taken in that direction. All this has been done with the history of certiorari and of the effect of prescribing a general form for conviction present to the mind of the Legislature concerned, and the enactments so passed must be read in the light of these general provisions. If so, no marked difference can be found between the systems under which in England and in Canada summary jurisdiction

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

is applied to offences against liquor laws, and it follows prima facie that Canadian legislation, affecting summary convictions and the powers of superior Courts to quash them upon certiorari, is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of certiorari only where explicit language is used for that purpose, and, on the other hand, as contenting itself with an indirect limitation on the exercise of that jurisdiction, by substituting for the detailed record of a century and more ago the "unspeaking" form of a general conviction such as was prescribed in 1848. Of course, it is competent for the Legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negatived. This may be done notably in two ways. The one is to take away certiorari explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as "final" or "without appeal"; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence. In the present case it is argued that both methods have been employed in Alberta. The record, it is said, is made to contain the whole of the evidence and on certiorari the superior Court is directed to examine it. Three enactments are relied upon as differentiating the present case from the "latter-day" English cases. They are (1.) ss. 682, 683, 721, 793, 1017 and 1124 of the Canadian Criminal Code. The first two require that the evidence given before justices shall be taken down in the form of written depositions; s. 793 binds the magistrate to transmit the depositions with other papers to the clerk of the peace to be placed among the records of the general sessions of the peace; s. 1017 only refers to appeals and applications for new trials; s. 1124 is to the like effect; it uses practically the same terms as s. 62 of the Liquor Act, hereinafter quoted, and is re-enacted from 55 & 56 Vict. c. 29, s. 889; (2.) the provision in the Crown rules, which requires depositions to be returned with the conviction on certiorari; and (3.) ss. 62 and 63 of the Liquor Act, which are relied on as specific legislation, directing what is to be done with those depositions

in the superior Court on certiorari to bring up a conviction under the Liquor Act.

Their Lordships think it reasonably plain that no great reliance can be placed on any but the last of these provisions. To say that there would be no use in written depositions, if they were not to be available for use in a superior Court on certiorari, is to beg the question. Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but, if it is to be taken to good purpose, the depositions must have been put into permanent form while the evidence is being given. Even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the Court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge. Either of these considerations provides an abundant satisfaction for the sections, which require the evidence to be taken down, and it is unnecessary to speculate further as to their possible admissibility in the particular case of certiorari. Again, r. 4 of the Crown Practice Rules only requires that the evidence shall be returned with the conviction, and it refers to the depositions as separate papers or documents. Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or as requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding.

Sects. 62 and 63 of the Liquor Act are headed "Convictions and Subsequent Proceedings," and are as follows: "62. No conviction order or warrant for enforcing the same or other process shall upon any application by way of certiorari or for a habeas corpus or upon any appeal be held insufficient or invalid for any irregularity, informality or insufficiency therein, or by reason of any defect of form or substance therein, if the

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

Court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed. 63. The Court or judge hearing any such application of appeal may upon being satisfied as aforesaid, confirm, reverse or modify the decision, which is the subject of the application or appeal, or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just."

Here, no doubt, there is an express definition of the relation of depositions to certiorari, which excludes any implied relation such as has been referred to above. The depositions are not made part of the record. They are used as independent materials, upon which the judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section. It seems to have been thought in the Court below that, if the depositions could be looked at for one purpose on certiorari, they could be looked at for another, and that, as it is expressly provided that they are materials available for affirming an otherwise dubious conviction, they must also, by necessary implication, be materials available for quashing a conviction, which on its face appears to be beyond doubt. This is not so. Plainly, the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so; but it contains no word in his favour. The only wonder is that it does not provide for certiorari to bring up and quash an order dismissing the information.

The next section (s. 63) does, it is true, contain the word "reverse," but on examination it is clear that this is not a reversal that is to benefit the accused. The Court, upon being satisfied as aforesaid, that is, in the words of s. 62, being: "satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been

committed, ... may confirm, reverse or modify, ... or may amend the conviction or make another conviction."

The condition of power to reverse, in the sense of a power to let the guilty person off, cannot be a conclusion from evidence that the Act has been violated, and it is to be noted that the word is "reverse" and not "quash." What evidently is meant is that, on drawing the above conclusion from the evidence, the Court may, if it thinks fit to exercise the power of making some other conviction, reverse for that purpose the conviction actually made below, which otherwise would stand in the way, and direct the conviction, which in its opinion the justices should have pronounced.

Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction; that the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction.

The magistrate's order for the forfeiture of the entire stock of whisky in cases stands or falls by the same considerations as the conviction for keeping it unlawfully, though in itself it constituted by far the severest penalty. The learned judges below were not unnaturally impressed by the fact, that one reason for selecting as the offence to be charged an unlawful keeping instead of an unlawful selling, was to get the opportunity, after establishing the offence, of applying for the forfeiture of the stock of whisky. This, however, makes no difference to the legal aspect of the matter. There was also some irregularity in the issue of the search warrant, which preceded the application for forfeiture, and in the

J. C.
1922
REX
v.
NAT BELL LIQUORS, LD.

information on which it was applied for, but this does not afford a ground for quashing the order, if otherwise it is not impeachable. It is urged that there was no evidence which would justify the forfeiture, since proof of the unlawful sale of one case is no evidence of an unlawful keeping of the entire stock of cases, thousands in number. This, of course, is only another way of contending that there was no evidence of the commission of the principal offence. Even if the superior Court was entitled to investigate the nature and extent of the evidence, as to which the considerations already advanced need not be repeated, their Lordships are of opinion that this matter was one for the magistrate. If he believed the evidence as to the circumstances under which the whisky sold was inquired for, selected, sold and taken away, it cannot be said that his conclusion, that the whole stock and not the single case only was unlawfully kept, exceeded the provisions of the Liquor Act.

As leave was given for the appeal from the judgment of the Supreme Court of Alberta, upon which all the questions that arise can be completely disposed of, it became unnecessary, for the purpose of this case, to proceed with the appeal from the refusal of the Supreme Court of Canada to entertain the matter, and their Lordships might well have declined to entertain it. They have, however, been asked to give a decision on this point also, in order that a question of law, which it is suggested is at least doubtful, may be set at rest. On this ground, and not as opening the door in future to any general admission of argument upon points which do not necessarily arise, their Lordships are content to deal with it. The question is whether an appeal from the Supreme Court of Alberta in this case to the Supreme Court of Canada would have been a criminal cause or matter within the words of the Dominion statute (10 & 11 Geo. 5, c. 32). This Act, which received the Royal Assent shortly before the commencement of the proceedings now in question, excepted by s. 36 from the appellate jurisdiction of the Supreme Court of Canada, "proceedings for or upon a writ of certiorari arising out of a criminal charge." In

substance and for present purposes this was the law as laid down in the Supreme Court Act, ss. 35, 36 and 39, and the alterations made in 1920 are not now material.

The question whether a prosecution under a typical Temperance Act is or is not a criminal charge has twice been before the Supreme Court in recent years—namely, *In re McNutt* (1), which was a case of habeas corpus, and *Mitchell* v. *Tracey* (2), which was a case of prohibition. In the first, six judges took part in the hearing. Three of them held that the application for the writ arose " out of a criminal charge " ; one held that it did not, and one seriously doubted whether it did ; the remaining judge expressed no opinion on the point. The case was, however, capable of being disposed of on other grounds. Duff J. delivered an elaborate and striking judgment, to the effect that the application for the writ did not arise out of a criminal charge, and the principal judgment contra was that of Anglin J. In the second case, out of five judges who took part, three followed the conclusion of Anglin J. in the earlier case, Anglin J. himself being one, and two expressed no opinion on the point at all. Under these circumstances it becomes desirable to examine the question more fully than would otherwise be required, in view of the fact that the present case has been substantially disposed of on the appeal from the Supreme Court of Alberta.

The issue is really this. Ought the word " criminal " in the section in question to be limited to the sense in which " criminal " legislation is exclusively reserved to the Dominion Legislature by the British North America Act, s. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that s. 92 authorizes Provincial Legislatures to exercise ? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen L.J., in *Osborne* v. *Milman* (3), when he contrasts the cases " where

(1) (1912) 47 Can. S. C. R. 259. (2) (1919) 58 Can. S. C. R. 640.
(3) (1887) 18 Q. B. D. 471, 475.

J. C. 1922 REX v. NAT BELL LIQUORS, LD.

an act is prohibited, in the sense that it is rendered criminal," and " where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act."

Their Lordships are of opinion that the word " criminal " in the section and in the context in question is used in contradistinction to " civil," and " connotes a proceeding which is not civil in its character." Certiorari and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature, under s. 91, head 27. When the Supreme Court was established by statute in 1875, and this exception out of its powers as to habeas corpus was enacted by ss. 23 and 51, there was then in existence a substantial body of undoubtedly criminal matters, which did not rest on any statute, and this must have been within the purview of these sections, the British North America Act notwithstanding. After all, the Supreme Court Act is concerned not with the authority, which is the source of the " criminal " law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the Provincial Legislature is or not the competent legislative authority.

Their Lordships will therefore humbly advise His Majesty that on the appeal from the judgment of the Supreme Court of Alberta the appeal should be allowed ; that the judgments of the Supreme Court and of Hyndman J. should be set aside, and that the conviction and order for forfeiture should be restored, and the appeal from the Supreme Court of Canada should be dismissed. Their Lordships were given to understand that an arrangement has been made between the parties which makes any direction as to costs unnecessary on the present occasion.

Solicitors for appellant : *Blake & Redden.*
Solicitors for respondents : *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

GLEANER COMPANY, LIMITED . . . APPELLANTS;

AND

ASSESSMENT COMMITTEE . . . . RESPONDENTS.

J. C.*
1922
May 31.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Jamaica—Income Tax—Profits of Trade—Deduction for bad Debt—Debt incurred in earlier Year—Income Tax Law (No. 24 of 1919, Jamaica), s. 10 (d).

In assessing the annual profits or gains derived from a trading concern for the purposes of the Income Tax Law, 1919, of Jamaica (which Law closely follows the English Income Tax Acts) the taxpayer is not entitled under s. 10 to a deduction in respect of a debt found to be bad in the year of assessment but incurred in a previous year.

Observations as to the practice of the inland revenue authorities in England as to the deduction of bad debts from the annual profits.

Judgment of the Supreme Court affirmed.

APPEAL by special leave from a judgment (May 9, 1921) of a Full Court of the Supreme Court of Jamaica, affirming a judgment of the Chief Justice.

The appellant company was incorporated in Jamaica and carried on business there as newspaper proprietors. The question for determination in the appeal was whether in arriving at their profits for the year 1919 for the purpose of the Income Tax Law (No. 24 of 1919) as amended by the Income Tax Amendment Law (No. 39 of 1920) they were entitled to deduct debts found to be bad in 1919 but having first arisen from sales made prior to 1919.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee. Income tax was first imposed in Jamaica by the laws referred to above.

1922. May 2, 4. *Sir John Simon K.C.* and *Latter K.C.* for the appellants. The appellants were entitled to the deduction which they claimed. In order to ascertain the annual profits it is necessary to value the assets representing

* *Present:* LORD BUCKMASTER, LORD SUMNER, and LORD PARMOOR.

J. C. 1922 GLEANER Co. v. ASSESSMENT COMMITTEE.

the circulating capital of the business including trade debts; for that purpose a trade debt hitherto regarded as good but found in the year of assessment to be bad should be deducted: *In re Spanish Prospecting Co.* (1); *Lubbock* v. *British Bank of South America* (2); *Usher's Wiltshire Brewery* v. *Bruce.* (3) It is not material for that purpose when the debt first arose, or that it arose before income tax was first imposed in the island. The right to deduct bad debts is expressly conferred by s. 10 (*d*) of the law of 1919. That section, while intended to prevent the deduction of a general reserve for bad debts in arriving at the annual value, does not exclude from the bad debts which may be deducted those which arose previously; that view is supported by the provision in s. 10 (*d*) as to bankruptcy. Under the English Acts upon which these Jamaica laws are founded the right to deduct debts shown to be bad is not confined to debts which arose in the year of assessment. That it was so confined was not suggested in *Reid's Brewery Co.* v. *Male* (4), or in *English Crown Spelter Co.* v. *Baker* (5), although that contention would have been conclusive had it been well founded.

Hon. Sir William Finlay K.C. and *Bremner* for the respondents. The bad debts not having arisen in 1919 were not deductible. Under s. 14 of the law of 1919 the assessment had to be of income derived from the business in that year. By s. 3 the "income" to be assessed was the profit after deducting the "expenses of acquiring the income." No part of the deduction claimed was an expenditure or liability of the year 1919; a deduction in respect of a bad debt is allowed only if the debt has been brought in on the credit side. As a matter of construction the "debts" referred to in s. 10 are debts becoming due to the company in 1919, and the exception of bad debts therefore must be an exception out of the 1919 debts. The provision as to bankruptcy is in the respondents' favour, because it is based on expectation not on the actual result. The practice in England under which

(1) [1911] 1 Ch. 92.
(2) [1892] 2 Ch. 198, 202.
(3) [1915] A. C. 433.
(4) [1891] 2 Q. B. 1.
(5) (1908) 5 Tax Cas. 327.

bad debts are allowed to be deducted, although arising in former years, is purely an administrative concession to avoid the necessity of an estimate being made in each successive year; the practice has no statutory sanction. [Reference was made to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 50.]

Sir John Simon K.C. replied.

May 31. The judgment of their Lordships was delivered by

LORD BUCKMASTER. In 1919 income tax was imposed in the island of Jamaica by statute No. 24 of 1919, which in many respects followed closely the provisions of the Income Tax Acts in this country. The present appeal raises a plain question of construction of this statute, and the point, though obvious, is destitute of authority.

The circumstances of the present case can be stated in a few sentences: The appellant company carry on the business of newspaper proprietors in the island of Jamaica, and in 1920 they were assessed to income tax in respect of the income received by them in the course of their business during the previous year. In making a return for the purposes of this assessment they claimed an allowance of 1000*l.* as an estimated provision for bad and doubtful debts, and this was disallowed, but upon inquiry as to the validity of the item it was ascertained that there were debts discovered to be bad in the year 1919 amounting to 408*l.* 13*s.* 6*d.*, although no one of the debts had been incurred during that year, and the appellants consequently sought a deduction in respect of this sum. The Assessment Committee refused to allow the claim on the ground that the debts were no part of the current year's accounts, and an appeal from their decision to the Chief Justice met with no success. At the request of the appellants, however, the Chief Justice stated a case for the opinion of the full Court, who confirmed his judgment. From this decision the present appeal proceeds.

The question depends entirely upon an examination of the provisions of the statute, and especially upon the sections relating to the method upon which the returns for income

J. C. 1922 GLEANER Co. v. ASSESSMENT COMMITTEE.

tax are to be prepared. By s. 3 the word "income" is defined in these words: "The expression 'income' means net income—namely, the sum remaining after deducting the expenses, if any, of acquiring the income, including the necessary expenses actually paid in carrying on any business or trade, but not including personal living or family expenses." Sect. 4 then provides that after the commencement of the statute there shall be charged "an annual duty on the incomes of all persons called income tax." Sect. 5 enacts that income tax shall be payable in respect of, amongst other incomes, the income "derived from the annual profits or gains from any . . . . trading adventure or concern in the nature of a trade."

Sect. 10 is the critical section in the present case, and it runs as follows: "No deduction in respect of income shall be allowed in respect of: (*a*) Any disbursements or expenses not being money wholly and exclusively laid out or expended in acquiring the income upon which income tax is payable; (*b*) any capital withdrawn, or any sum employed or intended to be employed as capital; (*c*) any capital employed in improvements; (*d*) any debts, except bad debts, proved to be such to the satisfaction of the Assessment Committee, and doubtful debts to the extent that they are respectively estimated by the Assessment Committee to be bad. In the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof."

Sect. 14 provides that the tax shall be assessed in the year 1920 in respect of income derived during the year 1919. Sect. 19 requires a true account of income to be delivered to the Assistant Commissioner, and s. 21 that, after such returns are made, the Assessment Committee shall assess the amount of income tax. Sect. 24 enables an appeal to be made against the assessment within thirty days. Sect. 30 enables the Assessment Committee, during the year of assessment or within two years afterwards, to make a further assessment if they discover that the amount assessed is less than that which ought to have been charged, and s. 40 enables the

Governor in Privy Council to remit the whole or any part of the income tax payable by any person if he is satisfied that it would be just and equitable to do so.

The Act of 1920—No. 39 of that year—provides by s. 24 that if the amount paid is in excess of the amount properly chargeable, the person so paying may claim repayment within twelve months from the date of assessment. There are no further material provisions in the statutes.

The appellants contend that the true meaning of s. 10 is that debts may be deducted in the year in which they are found to be bad from the annual profits of that year, although the debt may have been long antecedently incurred, or, in other words, that for the purposes of the statute the actual calculation of the annual profits in any particular year involves allowance for debts included in former accounts as good or doubtful, but discovered as bad in the year under consideration. Their Lordships find themselves unable to accept this contention.

The income that is to be returned is the net income after deducting the expenses of acquiring the same, and, but for s. 10, it might well be argued that in the case of a business debts not actually received formed no part of the income at all, although, as is well known, the annual profits or gains of a trader are not properly measured by considering only the moneys taken. There must, in every profit and loss account, be an examination of the debts and a careful distinction between those that are good, doubtful and bad. Sir George Jessel M.R. said in *In re Frank Mills Mining Co.* (1), in reference to business accounts: "You cannot properly put down a single debt as an asset without some consideration of the circumstances of the debtor."

This estimate should be made in every year of trading, and when it has been fixed the annual profits for that particular year are ascertained. It may well be that for purposes of prudence all the income so earned could not be wisely taken out of the business and enjoyed, for the estimates may be falsified by subsequent events. If in any year a loss falls

(1) (1883) 23 Ch. D. 52, 57.

J. C. 1922 GLEANER Co. v. ASSESSMENT COMMITTEE.

upon a business owing to the fact that debts which, in former profit and loss accounts, had been regarded as good, had become, in the interval, irrecoverable and bad, this incident would mean that the former profit and loss accounts had in the event been inaccurately estimated, and that the moneys then taken from the business on the assumption that the estimates were good had been drawn in excess of what the actual facts show on the true position was permissible. It is, in their Lordships' opinion, to determine under these considerations what allowances should be made that s. 10 is directed. It provides, in the first place, that in making up the account there cannot be a deduction for "any debts." This can only mean that the trader is not at liberty to limit the "income" which he returns to the amount actually received, but must estimate the value of the debts that have accrued due to him in the year's trading. But the provision that so excludes him provides also that there should be exempted from this exclusion bad debts proved to be such to the satisfaction of the Assessment Committee and doubtful debts to the extent to which they are estimated by the Assessment Committee to be bad. Their Lordships think that this exception must apply to the general provision as to the debts, and that as the debts which may not be deducted are debts that have accrued due to the taxpayer in the year's trading but have not been received, so the exception is out of that amount, and bad and doubtful debts are, consequently, bad or doubtful debts arising out of the year's trading and ascertained and determined to be bad or doubtful during that year. The contrary decision would involve the introduction into the clause of the statement that bad debts are to be deducted only in the year in which they are found to be bad, and yet, apart from bankruptcy or the disappearance of a creditor, it might be very difficult to ascertain the moment when this event was definitely determined. The matter can be better decided by considering that the same reasoning applies to doubtful debts; these also, to the extent to which they are bad, have to be estimated by the Assessment Committee, and, subject to the

provisions to which reference has been made, under which the assessment may be appealed from or its effect varied, the assessment when made is final. If, therefore, debts decided to be doubtful in one year were found to be good at a later date, apart from the provisions of s. 30, there are no means whatever of obtaining further income tax upon the amount, nor, if their value further diminish, could they be the subject of reassessment. The investigation by the Assessment Committee of the debts is an investigation year by year, and when once they have been the subject of investigation, alteration is impossible except under the provisions of the sections relating to appeal and further assessment or the recovery of sums paid in excess. The reference to bankruptcy at the end of the sub-section which is relied upon by the appellant appears, in their Lordships' minds, to strengthen the opinion that they have formed, for it shows that the actual value of the debt does not wait to be measured by determining the exact sum that is in fact received in liquidation, but is to be the sum that it is reasonably expected might be received. Were the appellants' contention correct the actual sums received ought to be the amount included in the assessment in the year of receipt.

The other provisions of the section are said to show that the sub-s. (*d*) must be dealing with something of a capital nature. Their Lordships can find nothing to support that view merely from the fact that in other parts of the section capital items are dealt with.

Their Lordships have been referred to the practice of the inland revenue authorities in this country under similar provisions, which appears to sanction the practice of permitting debts that are bad to be deducted in the year the loss is sustained. Their Lordships are unable to attach any weight to this practice. It may be due either to a misunderstanding of the statute, or it may be that if all the provisions of the various English Income Tax Acts were examined they might bear a different interpretation to those that are now before their Lordships; or again, the convenience of administration may have suggested this form of relief. Their Lordships

J. C. 1922 GLEANER Co. v. ASSESSMENT COMMITTEE.

are unable to appreciate how the establishment of this practice, although it may be of long standing, can afford them assistance in the present dispute. It may, however, afford some explanation of why the particular point has never been taken in English Courts, although in one or two cases to which attention has been called it may have been relevant for discussion.

For these reasons their Lordships will humbly advise His Majesty that the judgments of the Chief Justice and the Full Court were right and that this appeal should be dismissed with costs.

Solicitors for appellants: *Morley, Shirreff & Co.*
Solicitors for respondents: *Freshfields, Leese & Munns.*

[PRIVY COUNCIL.]

J. C.* 1922 *June* 15.

NOVA SCOTIA STEEL AND COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MINISTER OF FINANCE AND CUSTOMS RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland—Tax on Profits—Profits from Export of Ore—Exemption from Taxation "upon or in respect of" Ore—Construction—Business Profits Tax Act, 1917 (8 *Geo.* 5, *c.* 1, *Newfoundland*).

The appellants carried on in Newfoundland the business of exporting ore. Under an agreement with the Government, confirmed by a statute of 1910, they paid a tax on each ton of ore exported by them, and were exempt from paying any further charge or tax "upon or in respect of the said ore." By the Business Profits Tax, 1917, of Newfoundland an annual tax was imposed on the net profits of businesses. The

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

appellants claimed that the agreement of 1910 exempted them from paying the profits tax:—

Held, that the tax upon profits was not a tax upon or in respect of the ore exported, and that the appellants were liable to pay it.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of Newfoundland (May 2, 1921) upon a special case stated.

The appellants were a company incorporated under the law of Nova Scotia, and carried on in Newfoundland the business of mining and exporting iron ore from Bell Island. By an agreement made in 1910 between the Government of Newfoundland and the appellants, and confirmed by 10 Edw. 7, c. 26 (Newfoundland), the appellants agreed to pay to the Government 7½ per cent. upon each ton of ore exported to the end of 1919, and it was agreed that during that period "no other or further charge or tax shall be levied or imposed upon or in respect of the said ore." By the Business Profits Tax Act, 1917 (8 Geo. 5, c. 1, Newfoundland), a tax of 20 per cent. was imposed on the net profits of all trades and businesses (including the business of transportation) carried on, or partly carried on, in Newfoundland, except the business of life insurance. The respondent assessed the appellants under the Act in respect of the years 1917 and 1918. The appellants having disputed the assessments, the dispute was referred under s. 7 (*a*) to arbitrators, who stated a case for the opinion of the Supreme Court. It was stated in the case that the appellants were to be taken as carrying on in Newfoundland a business consisting entirely of mining and exporting ore from Bell Island.

The Supreme Court (Johnson and Kent JJ.; Horwood C.J. dissenting) held that the appellants were liable.

1922. May 11. *Hogg K.C.* and *Hon. Geoffrey Lawrence* for the appellants. The tax sought to be imposed is a "charge or tax upon or in respect of the said ore" within the meaning of the agreement of 1910; the appellants are therefore exempted from the tax. The Act of 1917 being a general taxing statute ought not to be construed as repealing the Act of 1910, in the absence of an express provision to that

J. C. 1922

NOVA SCOTIA STEEL AND COAL CO. v. MINISTER OF FINANCE AND CUSTOMS.

effect: *Blackpool Corporation* v. *Starr Estate Co.* (1); *Barker* v. *Edger* (2); *Pole-Carew* v. *Craddock.* (3)

Barrington-Ward K.C. and *Monckton* for the respondent. The words relied on in the statutory agreement of 1910 are confined to a charge or tax on ore exported, and do not extend to any commercial transaction or dealing with the ore. The subject matter of the two Acts is essentially different. The Act of 1917 does not impose any charge or tax upon the ore, nor in respect of the ore. The words "in respect of" would apply to a registration charge or stamp duty imposed on ore exported.

June 15. The judgment of their Lordships was delivered by

LORD SUMNER. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. As applied to the appellant company, the Business Profits Tax Act, 1917, imposes on them a tax of 20 per cent. of the net profits arising from and earned by their Newfoundland business for the accounting period in question. The earlier Act, 10 Edw. 7, c. 26, provides that for a time, which includes that period, there shall be levied or imposed upon or in respect of the ore, which it is the appellants' Newfoundland business to export from Bell Island, no other or further charge than the amount of 7½ cents per ton. In their Lordships' opinion, the Business Profits Tax is not a charge or tax levied or imposed on or in respect of this ore. Clearly it is not levied on the ore itself, ton by ton, or at all; it is levied on profits. Nor is it levied in respect of the ore; it is levied on or consists in taking a fraction of profits, which result indeed from some kind of trading in the ore, but are earned by dealings with it after it has become liable to the payment of the 7½ cents per ton. The profits may be variously made, for the ore, after being exported, may be either used by the appellants themselves or sold to others. In the latter case, the whole profit arising from dealing with a particular parcel of ore might accrue from fluctuations in freight or exchange

(1) [1922] 1 A. C. 27, 34. (2) [1898] A. C. 748, 754.
(3) [1920] 3 K. B. 109.

under the terms of a forward sale. In the former, the whole question of profit might be determined by the price at which the ore in question was taken into consumption by the appellants themselves. The exporting of the ore and the liability to pay the 7½ cents might fall into an accounting period different from that in respect of which the business profits tax in question would be chargeable.

So much for actual conditions, but in general a tax on profits and an export tax on commodities are different imposts, financially and economically, and cannot be identified even by the indefinite expression "in respect of." Taxes or charges "in respect of" the ore, to which the provisions of the earlier Act would apply, may easily be suggested, as for example stamp duties or registration fees. These provisions can, therefore, be satisfied without extending them to the Business Profits Tax, and no question arises of reading two Acts together, so as to involve the subordination of the terms of the one to the provisions of the other, because both apply to the same subject matter, the one generally and the other particularly.

Solicitors for appellants: *Piesse & Sons.*
Solicitors for respondent: *Burn & Berridge.*

Referred to. SMILEY *v.* TOWNSHEND [1950] 2 K. B. 311

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *March* 21.

MATTHEY . . . . . APPELLANT;

AND

CURLING . . . . . RESPONDENT.

Landlord and Tenant—Covenants to repair, insure and reinstate—Breach—Impossibility of Performance—Requisition by War Office—Destruction of Premises by Fire—Eviction by Title Paramount—Prevention by Act of State.

During the currency of a lease of a house and land, the military authorities, acting under the powers conferred by the Defence of the Realm Regulations, took possession of the demised premises and continued in occupation thereof until after the expiration of the term. The lease contained covenants, in the usual form, by the lessee, to repair, to deliver up in repair, to insure, and in the event of the demised buildings being destroyed or damaged by fire at any time during the term forthwith to expend the insurance money in rebuilding. On February 12, 1919, the house was destroyed by fire. On March 25, 1919, the term expired by effluxion of time. In an action commenced after that date the lessor claimed from the lessee payment of the last quarter's rent and damages for breach of the above-mentioned covenants:—

Held (affirming the decision of the Court of Appeal), that the lessee had not been evicted by title paramount and was liable for the rent; and that the temporary occupation by the military authorities did not excuse him from performance of the repairing covenants.

Whitehall Court v. *Ettlinger* [1920] 1 K. B. 680 approved.

Baily v. *De Crespigny* (1869) L. R. 4 Q. B. 180 distinguished.

Harding v. *Metropolitan Ry. Co.* (1872) L. R. 7 Ch. 154 applied.

Dictum of Grove J. in *Mills* v. *East London Union* (1872) L. R. 8 C. P. 79, 85 disapproved.

Per Lord Atkinson. Where leasehold premises are damaged or destroyed by fire near the end of the term the obligation of the covenantor under the ordinary lessee's covenant to reinstate, in the absence of any special provision fixing the time of performance, does not come to an end at the end of the term, but he is allowed a reasonable time for reinstatement.

APPEAL from an order of the Court of Appeal reversing in part a judgment of Bailhache J. (1)

The judgments of the Court of Appeal are included in this report.

By a lease dated March 25, 1898, the respondent demised

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

(1) [1920] 3 K. B. 608.

to the appellant for a term of twenty-one years from that date a house and grounds known as Offley Holes in the parish of Preston, Hertfordshire, at a yearly rent of 300*l.*

Under a proviso in the lease some further land was included and the rent was increased to 392*l.* 10*s.*

The lease contained (inter alia) covenants by the lessee to keep the premises in repair, to yield them up in repair, and to insure against damage by fire in the joint names of himself and the lessor and, in case the premises or any part thereof should at any time during the term be destroyed by fire, to forthwith lay out the moneys to be received in respect of such insurance in reinstating the premises and in case such moneys should be insufficient to make good the deficiency out of his own moneys.

The covenants are fully set out in the judgment of Atkin L.J.

On March 23, 1904, the appellant assigned the lease to J. C. Priestley, who on December 25, 1908, assigned it to Major R. M. Richardson. On March 6, 1917, Major Richardson died and the lease became vested in his executors Mrs. Richardson, Brigadier-General H. Page Croft, and Mr. C. E. W. Ogilvie, who acted as solicitor for himself and his co-executors. On January 29, 1918, the military authorities took possession of the house and part of the adjoining lands by an order of that date in the following terms :

" Order by Military Authorities taking possession.

Order. 12 Area 1918/2. by Colonel H. E. B. Newenham, C.B., Officer Commanding No. 10 District Hounslow.

By virtue of the powers conferred on me under Regulation 2 of the Defence of the Realm (Consolidation) Regulations 1914. I Colonel H. Newenham C.B. Officer Commanding, No. 10 District Hounslow, being a Competent Military Authority do hereby take possession of all that private dwelling-house and premises, situate and known as Offley Holes, Preston, near Hitchin, in the County of Hertford, together with garden and appurtenances

H. L. (E.) 1922 MATTHEY v. CURLING.

belonging thereto as from the 28th (twenty-eighth) day of January 1918.

Given under my hand this 29th day of January 1918.

(Sgd.) H. Newenham, Colonel.
Commanding No. 10 District.
Competent Military Authority
No. 12 Area Eastern Command.

To :—C. E. W. Ogilvie,
32, Essex Street, Strand.
for himself and Mrs. Richardson and Brigadier-General Page Croft."

The premises were used for the purpose of housing German prisoners of war. On February 12, 1919, the house was destroyed by fire. Mr. Ogilvie on behalf of the executors gave formal notice of the fire to the military authorities and stated that the executors would look to the War Office to indemnify them, but the War Office denied liability. On March 25, 1919, the lease expired by effluxion of time. On June 4, 1919, the military authorities relinquished their formal possession of the ruins of the mansion house.

On June 6, 1919, the respondent commenced this action against the appellant for damages for breach of covenant, and for payment of 98*l.* 2*s.* 6*d.*, the rent for the quarter ending March 25, 1919. The appellant served a third-party notice on Priestley and Priestley served a fourth-party notice on Major Richardson's executors, who obtained leave to defend the action in the appellant's name. The appellant pleaded in his defence that the performance of the covenants had become impossible in law and was excused and (2.) as to the rent that there was an eviction by title paramount from a part of the demised premises, and he paid 25*l.* into Court as the apportioned part of the rent for so much of the premises as had not been taken by the military authorities.

Bailhache J., on the authority of *Whitehall Court* v. *Ettlinger* (1) gave judgment for the respondent (the plaintiff) on the question of the rent, but on the question of breach of covenant he gave judgment for the appellant on the ground

(1) [1920] 1 K. B. 680.

that the requisition of the premises by the military authorities had rendered performance of the covenants impossible.

The respondent appealed against this judgment on the question of breach of covenant and there was a cross-appeal by the appellant on the question of the rent.

The Court of Appeal by a majority (Atkin L.J. dissenting) allowed the appeal and dismissed the cross-appeal.

On May 9, 1921, the Lords Justices gave judgment as follows :—

BANKES L.J. [after stating the facts :] The defendant relied upon a number of different grounds in support of his contention that at most he could only be held liable for an apportioned portion of the rent. It is necessary to deal with these grounds separately. As a first ground the defendant contended that the action of the military authority in taking possession of the premises operated to put an end to the lease altogether, and so to free him from any obligation under any of the covenants. In support of this contention it was said that such taking possession amounted either to an eviction by title paramount, or operated as what is popularly spoken of as a frustration of the adventure. Bailhache J. gave no decision on these points, as he considered that the case was covered by the decision of Lord Reading C.J. in *Whitehall Court* v. *Ettlinger* (1), which he ought to follow. The points have been elaborately argued. In my opinion the decision of them must depend to a considerable extent upon the true inferences to be drawn from the facts. As a matter of law there appear to me to be great difficulties in the defendant's way in establishing an eviction by title paramount. In the first place if any one was evicted it was not the defendant. He had parted with his entire interest in the lease and had gone out of possession, taking a covenant of indemnity from his assignee as a protection against any failure to perform the covenants of the lease. The eviction (if any) was an eviction of an assignee of the original assignee. In the second place I think that the

(1) [1920] 1 K. B. 680.

H. L. (E.) 1922 MATTHEY v. CURLING. Bankes L.J.

Lord Chief Justice was right in *Ettlinger's Case* (1) in drawing attention to the distinction which exists between the ordinary case of an eviction by title paramount, where the title under which the occupant holds possession is challenged, and a case where the military authorities take temporary possession under the Defence of the Realm Regulations. The taking possession of property under the Defence of the Realm Regulations appears to me to be much nearer akin to a taking under the statutory authority of the Lands Clauses Acts than to an eviction by title paramount. In a taking of a tenant's interest under the authority of the Lands Clauses Act the position of the tenant is very different from that of a tenant evicted by title paramount: see *Harding* v. *Metropolitan Ry. Co.* (2); *Mills* v. *East London Union.* (3) In the view I take of the facts it is not necessary to express any opinion as to whether I agree with the inference of fact which the Lord Chief Justice drew in *Ettlinger's Case* (1), or to suggest that the taking of possession by the military authorities under the Defence of the Realm Regulations can under no circumstances amount to an eviction by title paramount, or to decide whether the defendant can rely upon an eviction of his assignees, because I consider that upon the facts as proved it is not possible to establish that the executors of Major Richardson ever were evicted, or ever claimed to have been evicted, by title paramount. For reasons which appeared to them sufficient, and which it is quite easy to understand, the executors appear to have considered it to their interest to treat the lease as subsisting, and the occupation of the military authorities, although not that of a sub-tenant or assignee, as an occupation from which they might reasonably expect compensation in lieu of rent, and a substantial contribution towards dilapidations: see Mr. Ogilvie's letters of June 3, 1918, and February 15, 1919.

Whatever their motives may have been, it seems to me clear that Major Richardson's executors never considered that they had been evicted from any part of the demised premises;

(1) [1920] 1 K. B. 680. (2) L. R. 7 Ch. 154.
(3) L. R. 8 C. P. 79.

they continued to pay rent for the whole, and the letters of May 16, 21, and 24, 1919, between Mr. Ogilvie and the plaintiff's solicitors throw considerable light not only upon the circumstances attending the original taking of possession by the military authorities, but upon the circumstances under which the claim to be relieved of the payment of any part of the rent was first made. The defendant, in my opinion, fails to establish an eviction in fact.

Apart altogether from this view of the case, which depends upon the true inference to be drawn from the facts, the law appears well settled that, upon an eviction of a lessee by title paramount from part only of the demised premises, the personal covenants of the lessee are not apportionable, though the covenant for the payment of rent may be apportioned: *Stevenson* v. *Lambard* (1); *Newton* v. *Allin* (2); and see the observations of Cave J. and Fry L.J. in *Baynton* v. *Morgan*. (3) Whether therefore the question is considered as a question of fact, or as a question of law, the defendant's claim that he is released from all his liability upon all the covenants in the lease as a consequence of an eviction by title paramount fails.

The other contention on this part of the case is founded upon the doctrine of frustration. There appear to me to be several reasons why the doctrine is not applicable to the present case. There is first of all the fact that the lease is not for this purpose a divisible contract. If the doctrine applies, the lease as a whole is at an end. It is difficult to see how this can be, having regard to the fact that the executors continued in occupation of a considerable part of the demised premises, and paid rent for the whole. There is also the difficulty pointed out by Lush J. in *London and Northern Estates Co.* v. *Schlesinger* (4), and referred to by the Lord Chief Justice in *Whitehall Court* v. *Ettlinger* (5), that a lease is something more than a mere contract, because by it a term of years is created and vested in the lessee. Apart from these

(1) (1802) 2 East, 575.
(2) (1841) 1 Q. B. 518.
(3) (1888) 21 Q. B. D. 101, 106; 22 Q. B. D. 74, 81.
(4) [1916] 1 K. B. 20, 24.
(5) [1920] 1 K. B. 686.

H. L. (E.) 1922 MATTHEY v. CURLING. Bankes L.J.

considerations altogether I do not think that the facts of the present case admit of the application of the doctrine which depends upon the Court being able to infer an implied term of the lease that in the event either of the mansion house being destroyed by fire and of some subsequent assignee being unable to obtain access to part of the premises in order to repair them, the lease should be dissolved and the parties released from their covenants. The first of these events is expressly provided for by the lease itself, and the second appears to me one on the happening of which, adopting Lord Watson's test in *Dahl* v. *Nelson, Donkin & Co.* (1), no fair and reasonable lessor would have been the least likely to agree to the dissolution of the lease had he been asked at the time of the granting of the lease to do so.

A further ground upon which the defendant disputed his liability upon the covenants to repair and to deliver up in repair was that the performance of those covenants became impossible by operation of law, and *Baily* v. *De Crespigny* (2), and other cases of that class were relied upon. It is not disputed that the occupation by the military authorities did not prevent the payment of rent. If the view which I have already expressed as to the defendant's other grounds of defence is correct, it follows that the defendant has no defence to the claim for the quarter's rent, and Bailhache J.'s judgment on this point must stand and the cross-appeal must be dismissed with costs.

Bailhache J. held that the defendant had made out his defence of impossibility of performance by operation of law so far as it related to his obligation under the covenants to repair and to deliver up in repair. Except as to the obligation to deliver up the premises in repair I am unable to agree with the learned judge's conclusions on this part of the case. The onus of establishing the alleged impossibility of performance rests upon the defendant. No evidence of any kind was given on his behalf beyond the bare fact that some undefined portion of the demised premises, including the

(1) (1881) 6 App. Cas. 38, 59. (2) L. R. 4 Q. B. 180.

dwelling house, was taken possession of by the military authorities as from January 28, 1918, for the purpose of housing prisoners of war engaged in agriculture, and that such possession was not given up until after the lease had expired.

Under these circumstances it appears to me necessary in order to decide this point in the defendant's favour to accept one or other of the following propositions—namely, (*a*) that the mere fact of the military authorities being in such occupation is sufficient in law to establish the defence of impossibility of performance, or (*b*) that the Court must take judicial notice that the effect of such an occupation is in fact to render the performance of the covenants to repair impossible. I am not able to accept either proposition. There are three periods of time which it is necessary to consider in relation to the defendant's contention on this part of the case. They are, first, the period prior to the occupation by the military authorities; secondly, the period from the commencement of that occupation down to the date of the fire; and, thirdly, the period from the date of the fire to the termination of the lease. The trial in the Court below was confined to the question of liability. The existence of dilapidations was assumed. Attention was concentrated on the defences set up by the defendant, and the question whether the plaintiff had a cause of action in respect of the first of these periods was not gone into. There appears to be ground for thinking that he might have such a cause of action. In Mr. Ogilvie's letter of June 3, 1918, he refers to a notice of dilapidations prepared before the military authorities took possession, and the settlement which was come to in reference to the unoccupied portion of the demised premises suggests that the schedule of dilapidations referred to in para. 6 of the defence included dilapidations in existence during this first period. The defendant can have no defence in respect of breaches of covenant to repair committed during the first period, and having regard to the way the case was fought I do not think that a judgment can stand which shuts the plaintiff out from any redress in respect of any such breaches. With regard to the second and third periods the

H. L. (E.) 1922 MATTHEY v. CURLING. Bankes L.J.

defendant would no doubt be entitled to rely upon the defence of impossibility of performance if he could have established it. My difficulty on this point arises from the complete absence of evidence to negative what I cannot but regard as common knowledge in reference to the taking possession by the military authorities of occupied country houses for the housing of prisoners of war engaged in agriculture, and the use to which such houses were put. Having regard to that knowledge, I am not prepared to assume without evidence that any part of the dwelling house beyond the outbuildings and servants' quarters was made use of for any purpose; nor am I prepared to assume that the men selected to be engaged in agriculture were not so engaged on adjoining farms during the working hours of the day, and thus absent from the demised premises during those hours; nor am I prepared to assume that any objection would be raised to allowing workmen to come upon the demised premises to execute repairs, seeing that the prisoners engaged in agriculture were allowed to associate freely with workers on the land; nor am I prepared to assume that, if permission to do necessary repairs had been applied for by Major Richardson's executors, it would inevitably have been refused. I can quite understand that it was extremely unlikely under the circumstances that such an application would be made, but that does not appear to me to be material. In order to arrive at a conclusion in the defendant's favour upon this question of impossibility of performance, which appears to me to be a question of fact rather than a question of law, I think it essential that more evidence should have been given than was given from which the inference of impossibility of performance could legitimately have been drawn. Much might depend upon the precise nature of the repairs which had to be done. For aught I know evidence might have been given which could have established the defendant's contention beyond all doubt. To decide in the defendant's favour without such evidence appears to me to be deciding upon mere conjecture. If this conclusion is correct with reference to the period from the

commencement of the military occupation down to the date of the fire, it must obviously be correct in reference to the period from the date of the fire to the termination of the lease. Indeed, after the dwelling house was entirely demolished there seems little reason why objection should have been taken to Major Richardson's executors coming upon the premises to do anything the lease required them to do. The time was too short for any effective step to have been taken towards rebuilding, but that does not negative the possibility of doing anything. Neither party suggested a new trial for the purpose of supplying further information, and upon the evidence as it stands I consider for the above reasons that the defendant failed to establish this branch of the defence. Having regard however to the fact that the house was entirely destroyed by the fire, this view of the defendant's liability upon the covenants to repair becomes probably of little importance, if the defendant is liable, as I think he is, under his covenant to reinstate.

Some question was raised in the Court below as to the defendant's liability on the ground that the policy was not taken out in joint names and was taken out for too small an amount. The matter was not pursued or pressed, and as it is one upon which evidence might have been called for the defendant in the Court below had a different course been taken by the plaintiff, I do not think that this Court should deal with these points.

A serious question was, however, raised and pressed in the Court below as to the defendant's liability on the covenant to reinstate. For the defendant it was said that any liability under this covenant ceased with the expiration of the lease. I cannot put this construction upon this covenant. It is no doubt true that many, if not most, of the covenants in a lease relate to matters which must be performed during the currency of the lease. The covenant to insure is one which the lessor requires the lessee to enter into in anticipation of a possible fire occurring at any time during the currency of the lease, even if it occur on the last day of the term. On the happening of such an event the covenant to reinstate applies,

H. L. (E.) 1922 MATTHEY v. CURLING. Bankes L.J.

and it requires the lessee to do something "forthwith." It appears to me to be no answer to say that the lessee has ceased to have any right to enter on the premises. He cannot of course fulfil his covenant unless the lessor gives him reasonable facilities for doing the necessary work. If the lessor refuses those facilities, the lessee would be discharged from any obligation under the covenant. In this case the covenant is not to rebuild forthwith, but in case the messuage should be destroyed by fire "to forthwith lay out all moneys to be received in respect of such insurance in rebuilding the same." This covenant has been read as though the receipt of the insurance money was a condition precedent to any obligation to rebuild. I think that it is open to another construction. The obligation is to lay out "forthwith," and the moneys to be laid out are those "to be received," not moneys when received. Assuming the insurance company with whom the insurance is effected is solvent and the amount receivable is ascertained or ascertainable, I think that it is arguable that the covenant requires the lessee to commence the rebuilding forthwith. If this construction of the covenant is the true one, no question of this action being premature arises. Assuming it not to be correct, I think the action has been fought throughout on the footing that all parties concerned had repudiated liability upon the covenants of the lease, and that the defence was being conducted upon that assumption. The point that the action was premature does not appear to have been considered in the Court below. The pleader anticipated it, as is shown by the amendment of the statement of claim, but the defendant took no notice of the amendment, and did not amend his defence, and under the circumstances disclosed in the correspondence I do not think that the Court ought to give effect to the objection. The defendant's solicitors appear to have been in touch with Major Richardson's executors on the question of liability, and ultimately allowed them to undertake the defendant's defence to the action. The correspondence on the question of liability began with the plaintiff's solicitor's letter to the defendant's solicitors of February 19, 1919, a copy of which

was sent to Mr. Ogilvie, who was acting as Major Richardson's executors' solicitor. On the following day the defendant's solicitors reply that they are taking up the matter with Mr. Ogilvie. On March 27 the plaintiff's solicitors write to Mr. Ogilvie pressing for a reply, and saying that unless some satisfactory arrangement can be come to they will be obliged to issue a writ against the defendant. To this Mr. Ogilvie replies denying all liability on the part of his clients for loss caused by the fire. On April 26 the defendant's solicitors write to the plaintiff's solicitors a letter in these terms: "Mr. Ogilvie tells me that the War Office repudiate liability for the fire. If your clients decide to begin proceedings against Mr. Matthey, we will accept service through the post." The writ was issued on June 6, and the defence without any qualification sets up the determination of all liability upon all the covenants in the lease by reason of the occupation of part of the demised premises by the military authorities. Under these circumstances the natural inference to draw appears to me to be that the communications between the solicitors for all three parties proceeded upon the footing that both the lessee and the assignee were repudiating liability upon the covenants. Whether this is so or not, I think that the circumstances were such as to require the defendant to take the point definitely in the Court below, so that the facts could be inquired into.

Nothing has been said in this Court in reference to the defendant's counterclaim under the Emergency Powers Act, and I express no opinion upon it. It is not necessary in the view I take of the case to say anything with reference to the plaintiff's claim under that Act.

For the reasons I have given I consider that the defendant has failed to establish that he has been relieved from liability under the covenants of the lease, and I think that the appeal must be allowed with costs, the judgment for the defendant set aside, and judgment entered for the plaintiff with costs, and there must be an inquiry as to damages upon the footing that the defendant continued liable under the covenants to repair and keep in repair and to reinstate the dwelling house after the fire.

H. L. (E.) 1922 MATTHEY v. CURLING.

ATKIN L.J. This case raises questions of importance to landlords and tenants, especially to those whose lands were taken possession of by the military authorities under powers exercised in pursuance of the Defence of the Realm Acts and Regulations. It is necessary to state briefly the facts. [His Lordship stated the facts and continued:] On June 6, 1919, the writ in this action was issued claiming damages for breach of the repairing covenants including covenants to insure and reinstate. The defendant's answer to the action, amongst others, is that the covenants became impossible of performance by operation of law by reason of the lawful possession of the military up to and beyond the expiration of the term. Liability on the covenants up to the taking possession by the military is admitted. No question was submitted to the learned judge below as to such liability, and no further question arises before us. The learned judge has given effect to the defendant's contention, and the question is whether he is wrong.

I have read the so-called order dated January 29, 1918, by which the military authority took possession of the premises in question. That possession was taken by the authorities against the will of the plaintiff is made plain by his letter at the time and by his evidence at the trial. The assignees did not assign or sublet the premises to the authorities; to do so would have been a breach of covenant. Nor could any act of the assignees have given the military authorities any possible right of possession after the termination of the term. It appears to me plain that the authorities entered and took and kept possession under the statutory right conferred upon them by the Defence of the Realm Act and Regulations, and not otherwise. Was the performance of the covenants made impossible by the possession of the military under the foregoing circumstances? It is necessary to read them: "Will from time to time and at all times during the said term well sufficiently and substantially repair uphold support maintain cleanse amend and keep the said messuage or tenement and buildings lodges stables coachhouse engine house buildings and premises

. . . . and the roadways paths walls . . . . with all necessary reparations cleansings and amendments whatsoever; and in particular will once in every third year of the said term paint the outside woodwork . . . . twice over in good oil paint . . . . and . . . . in the 21st year paint all the inside woodwork . . . . and polish with wax all the internal woodwork as is now waxed . . . . and will at all times during the said term cultivate and maintain the gardens and pleasure ground . . . . in good order and keep the bushes and shrubs properly pruned." These are obligations some of which involve a continuing duty throughout the whole term; others involve placing the structure temporarily in the possession of a number of workmen with daily facilities of access. How they could be performed consistently with the occupation by the military for the purpose of detaining prisoners I confess myself to be entirely unable to understand. Nor would it have occurred to me unaided that upon proof of such occupation performance was not prima facie proved to be impossible, and that further proof of request and refusal by the military to allow performance was necessary. One shrinks from imagining the terms in which such refusal might be couched. Nor is the position altered after the house was burnt down. The military authorities still held possession; no one had a right to enter upon the premises; and there is not the slightest evidence to support the notion that after the fire they would have welcomed the builder and his men and his carts and materials with any more fervour than before the fire. It is, however, in my judgment sufficient to say that if performance of a covenant requires the right of access to property, and that right of access is by law taken away, performance of the contract is prima facie rendered impossible. If I covenant to build on a field, the possession of which is lawfully taken from me, it does not appear necessary for my defence of non-performance that I should also have to prove that I asked the new possessor to be allowed to build on the field and that he refused permission.

I will only refer to one authority which appears to be capable

H. L. (E.) 1922 MATTHEY v. CURLING. Atkin L.J.

of being misunderstood: *Mills* v. *East London Union* (1) in 1872. The action was by lessor against lessee for damages for breach of covenant to repair. The lease was for twenty-one years from March, 1859, ending therefore in March, 1880. The Metropolitan Railway Company on February 7, 1866, served on the defendants notice to treat; on April 16, 1867, there was an award signed against the company for 3250*l.*; on July 29, 1870, the defendants signed judgment against the company for that amount; and on November 21, 1870, the defendants assigned all their interest to the company. They remained in possession until the last date. There were continuing breaches of covenant down to January 3, 1871, the date at which the action was begun. The question was when, if at all, the liability of the defendants ceased. The decision of the Court was that the liability continued longer than the defendants contended—i.e., that it continued until November 21, 1870, when the assignment was made and the company entered into possession. But the decision of the Court clearly was that the liability of the defendants did cease on that day long before the expiration of the term, and it appears to me plain that the ground was that on that day the principle of *Baily* v. *De Crespigny* (2) applied, and that the performance thereafter became impossible. It may be noted that, though the company had given notice to treat to the lessor and the lessor had sent in a claim, it is expressly stated that nothing more had been done on that notice or claim. It was suggested that as the tenant had already put it out of his power personally to perform the covenants by giving possession to his assignee, he was in no better position if the possession relied on was that of a third person who entered by a superior right. The answer, obvious as I should have thought, is that the covenant is for performance by the tenant or his assigns. If both are prevented from performance by operation of law the covenant cannot be enforced.

I propose to continue with the covenants, "and the said demised premises so well and sufficiently . . . . repaired

(1) L. R. 8 C. P. 79. (2) L. R. 4 Q. B. 180.

maintained painted . . . . waxed . . . . ground cultivated and left . . . . will at the expiration of the demise peaceably surrender to the lessor." This covenant fell to be performed on March 25, 1919. The military were at that time in possession and continued in possession till June. One of my brothers thinks that performance of this covenant was not proved to be impossible; the other thinks it was. I agree with the latter for reasons which I think apply to the whole of the repairing covenants. It was impossible to surrender the premises to the lessor, and it is perhaps sufficient to say that it becomes therefore immaterial to consider whether if the premises had been surrendered they would have been repaired, maintained, etc. But for the reason I have already given the obligation to repair was excused by legal impossibility.

It is now necessary to consider the covenant to insure and reinstate upon which reliance is placed. The covenant is: "And also will forthwith insure and keep insured against loss or damage by fire the said messuage etc. in the sum of 7,000*l.* . . . . in the joint names of the lessor and the lessee . . . . and in case the said messuages buildings and premises or any part thereof shall at any time during the said term be destroyed or damaged by fire then will forthwith lay out all moneys to be received in respect of such assurance in rebuilding repairing and reinstating the same in good and substantial manner to the satisfaction of the architect or surveyor to the lessor and in case such moneys shall be insufficient for such purpose will make good and provide the deficiency out of his own moneys." It is said by the plaintiff that, granted that this covenant could not be performed during the term, yet the obligation continued after the term, and was in existence after the military had given up possession. It had not been performed, and therefore the plaintiff was entitled to damages. There seem to me to be several answers to this contention. If the obligation under the covenant is limited to the duration of the term, it became impossible of performance for the reasons already given, which I need not repeat. It appears to me that in the case of a lease there is the strongest ground for holding that in the absence of express words to the contrary

H. L. (E.) 1922 MATTHEY v. CURLING. Atkin L.J.

a covenant by the lessee to perform acts upon the demised premises should be construed as limited to the duration of the term. The contrary view would be attended with the most inconvenient results. With the extended operation of the covenant there would have to be implied a licence to enter for the purpose of performing the covenant, a licence undetermined as to details by any agreement of the parties. The power of the lessor to make dispositions of the property to take effect on the termination of the lease might be seriously hampered. If he declined or put it out of his power to give the necessary licence, it is conceded that he could not rely upon a breach committed after the expiration of the term. On the other hand the value of the covenant would be seriously diminished, for if performance were legally possible after the expiration of the term and the lessor had by his own act made such performance impossible, he might be in serious difficulty in proving a breach during the term or in any case in proving any substantial damages, for the lessee might aver and prove that he had been ready and willing to comply with the covenant after the term and would have done so but for the lessor's conduct. No case has been cited in which such an extension of the covenant has even been argued, much less supported. Can it be suggested that a covenant to repair not containing the words "during the term" would operate for twenty years after the expiration of the lease? Coming to the terms of this particular lease it will be observed that while most of the covenants are expressed to operate during the said term two at least "will not cut or maim the main walls or timbers," and "will use the said messuage as a private dwelling house," have the words "during the said term" omitted, yet no one would construe the covenants except with the limitation. The present covenant is "in case the messuage . . . . shall at any time during the said term be destroyed . . . . by fire then will forthwith lay out all moneys to be received," etc. In my opinion "then" and "forthwith" mean during the term. If the events upon which the obligation arises occur during the term it seems to me that it matters not that the time for performance is short, even to

a degree to make performance physically impossible. From such impossibility the law does not relieve. The lessee's position is precisely the same as in the case of the repairing covenants, in respect of which no one suggests that there would not be a breach though the premises were damaged or destroyed on the last day of the term.

But there is a further answer in this case, which is that if the covenant became enforceable the obligation to reinstate is "then," "forthwith," and this obligation would arise at any rate between the date of the fire and the date in June when the military gave up possession, and for the whole of that time—i.e., after the expiration of the term as well as before—performance was impossible. The difficulties of the plaintiff, however, do not end here. The covenant is to lay out all moneys to be received in respect of such insurance. It appears to me to be a condition precedent that moneys should be received. It is common ground that no such moneys had been received at the date of the writ, June 6, 1919, and there is no plea and no evidence that such non-receipt was due to any default of the defendant. Moreover, even if an obligation was imposed upon the defendant as from the date of the fire, February 12, to lay out moneys in rebuilding, repairing, and reinstating, it seems to me impossible under the circumstances that there could have been any substantial breach by June 6, four months after, even ignoring the fact that at the date of the writ the military had only gone out of possession two days. It was sought before us to avoid these obvious difficulties by suggesting that the plaintiff had repudiated his obligation under the covenant, and thereby under a well-known principle of law waived compliance with conditions precedent. But the repudiation relied on is contained in a letter written by the solicitor to the assignees on behalf of his clients who were, of course, equally liable upon the covenants, but who are not sued in this action. If they had been and had raised this defence, their repudiation might have been an answer to their plea, but what relevance it has to an action against the immediate tenant I am at a loss to understand. It has never yet been held that an assignee is agent of the assignor to bind

H. L. (E.) 1922 MATTHEY v. CURLING. Atkin L.J.

him by admissions in respect of the several liabilities arising on covenant against the one by privity of contract and against the other by privity of estate, and there is no plea and no evidence that any agency had been created in the present case. There is no authority for holding, and I am not prepared to hold, that an assignee can bind the immediate lessee by an anticipatory breach. I can myself find no trace in the shorthand note of the proceedings that the case proceeded below on the admitted footing that there had been a repudiation.

The plaintiff was reduced to reliance upon a further point. In the present case resort was had by the defendant to third party procedure; he made the mesne assignee third party, who made the ultimate assignee fourth party. The third and fourth parties admitting their respective obligations to indemnify, the Master under Order XVI., r. 53, gave the fourth party liberty to defend the action in the name of the defendant. Such an order is not unusual under the circumstances, the party defending is defending the plaintiff's claim against the original defendant, not against himself, and how such an order can operate to alter the law of evidence and to make acts of the fourth party, done outside the course of the defence and even before the fourth party order, admissible evidence against the defendant was not explained.

For these reasons I think that the claim on the covenant to reinstate was misconceived, and the plaintiff has proved no right to relief in respect of it. It may be useful to remark that, even in cases where no breach of such a covenant can be proved, the lessor is entitled to similar relief against the insurance company under s. 83 of the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), as an "interested person": *Sinnott* v. *Bowden* (1), though of course he will not get the advantage of the additional personal liability of the covenantor to give complete reinstatement, unless his covenant is so expressed.

A question was suggested on the pleadings as to a breach by the defendant of the insurance covenant by not insuring in

(1) [1912] 2 Ch. 414.

both names, and also by not insuring for a sufficient sum. I agree with my Lord that these points were not raised in the Court below, and depending as they do upon evidence are not open before us. If they were open, no doubt a question would arise whether the insurance, though taken out in the tenant's or assignee's name, was not in fact intended by all parties to cover the interest of the lessor as well as the lessee.

The result of this view of the case is that the plaintiff has lost his remedy against the defendant on the repairing covenants and covenant to insure in respect of omissions occurring after possession was taken by the military. For any damage so suffered by him arising from the occupation by the military he will have a claim before the Defence of the Realm Losses Commission. Whether he has any remedy against the executors of the last assignee by reason of a tenancy by estoppel or otherwise is not a question that arises in this action. He retains all his remedies against both lessee and assignee in respect of breaches committed before the military took possession.

Agreeing as I do with the decision of Bailhache J. it becomes unnecessary to deal with the points raised by the defence as to frustration of contract and eviction by title paramount, so far as they relate to breaches of the repairing covenants, though they must be considered in dealing with the claim for the last quarter's rent.

It remains to deal with the last-mentioned claim. So far as the defence is based upon the doctrine of frustration I think that, assuming, but not deciding, that the principle of frustration is applicable to such a contract, the facts in the present case do not show that the contract was determined. Taking into account the period of military possession compared with the whole term, the fact that the right to actual occupation was in the assignee and not the defendant, that the assignee continued to pay rent thereby at any rate creating against himself a tenancy by estoppel for the rest of the term, I should not come to the conclusion that the Court should infer an implied term that in the events that happened the contract should come to an end. I will, however, add it

H. L. (E.) 1922 MATTHEY v. CURLING. Atkin L.J.

does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration.

It is only necessary in this case to consider the defence of eviction by title paramount in relation to the claim for rent. I am relieved by the former part of this judgment from considering it in relation to the other covenants. The principle seems plain: If the lessor in breach of his grant enters and evicts the lessee from any part of the demised premises, the obligation to pay rent is suspended while the eviction lasts, probably because rent issues out of the whole land demised. If a third person enters and evicts the lessee claiming by a lawful title superior to that of the lessor or lessee, then the obligation to pay rent is suspended entirely during the eviction if the eviction is from the whole of the demised premises, and is apportioned if it is from part. The doctrine seems to me to have nothing to do with impugning the title of the lessee or with the nature of the title of the evictor, provided his right to evict is lawful. The only point is, is the lessee lawfully deprived of possession of the whole or part of the demised premises, though the depriving of possession must be such as can fairly be described as an eviction, and not made a temporary interference with the lessee's possession as would constitute a mere trespass? Here it seems to me that all the elements exist to constitute an eviction by title paramount. The military authorities come in lawfully by statutory authority; they take possession of a substantial part of the premises against the will of the tenant; they remain in possession for over sixteen months, excluding from possession the tenant and his assignee. If the premises had been farm lands or business premises from which the rent was in fact earned, could there be any doubt

as to the justice and convenience of the application of the rule? It seems to me to make no difference that the premises were in fact unoccupied by the assignee, or that the latter, whether in ignorance of his rights or not, continued to pay rent to the plaintiff. I think on this part of the case that there was an eviction by title paramount from part of the premises and that the rent should be apportioned. I am unable to say whether the sum paid into Court by the defendant on this footing is sufficient. I should doubt whether it is, and I think that this matter in default of agreement should be referred to an official referee. In so deciding I differ from the decision of Lord Reading C.J., who in *Whitehall Court* v. *Ettlinger* (1), in similar circumstances, held there was no eviction by title paramount. The only reason for so holding that I can discern is that the occupation by the Government was for an undefined period. I cannot think that that fact in itself can prevent the act of taking possession from constituting an eviction.

For these reasons I think the defendant is entitled to judgment in the action on the claim on the covenants other than for rent, and that on the claim for rent the order should be what I have indicated.

YOUNGER L.J. The course which this case took in the Court below has left us now without any full or precise information as to the nature of the arrangements made between Major Richardson's executors on the one hand and the War Office on the other preliminary or with reference to the taking over by the War Office of Offley Holes House and its immediate curtilage. To the same cause is attributable the fact that the nature of the relations, which these executors, the assignees of the defendant's lease, continued to maintain towards the plaintiff with regard to their entire tenancy after the War Office were in full occupation of the portion appropriated to them, met there with so little consideration. These relations are referred to by the learned judge only in passing and in reference merely to the defence of

(1) [1920] 1 K. B. 680.

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

frustration. To my mind these arrangements and relations lie at the very root not of one only but of almost every question at issue in these proceedings. A full knowledge of the first would, I shrewdly suspect, resolve many difficulties, possibly otherwise formidable; while if the issue, which I may call the issue of impossibility, as developed before us, is approached without keeping constantly in mind the relations as tenants maintained at all relevant times by the executors towards the plaintiff, that issue is in my judgment never viewed from the proper angle as between the parties to this litigation.

The explanation of the course taken at the trial is not far to seek. The learned judge considered himself bound by the decision of Lord Reading C.J. in *Whitehall Court* v. *Ettlinger* (1), a decision which without its being necessary to take more than a very general view of the preliminaries and relations to which I have referred was, if correct, clearly a complete answer to the defences of frustration and eviction by title paramount as raised in the present case. The *Whitehall Court* (1) decision is however not binding upon this Court, and its correctness has been challenged here by the defendant, whose counsel have again raised these defences and have argued them independently of that case and with much elaboration. Again it was not, as I think, fully appreciated in the Court below how important on the defence of impossibility might be the bearing of the facts already referred to and not there fully explored. Had the arguments there taken the turn they did before us, that aspect of the case would not, I think, have been missed. But it was, and the result is that, at least in the view which I myself take of the dispute, we are called upon now to make for ourselves for the first time, in this Court, and with somewhat scanty material available for the task, such inquiry into the facts as is possible in the circumstances. I cannot but regard that position as unfortunate.

The lease, in this case, of March 25, 1898, comprised the Offley Holes House and surrounding grass lands, the entire

(1) [1920] 1 K. B. 680.

area demised, inclusive of the further lands taken by the defendant under the option reserved to him by the lease, being over 300 acres. The rent reserved by the lease for Offley Holes House and the 14¼ acres included in the original demise was 300*l.* a year. For the further acreage 15*s.* an acre was payable. The gross rent of the entirety must therefore have been on these figures over 500*l.* a year. In 1918 the net quarterly rent after deducting landlord's property tax was in fact 98*l.* 2*s.* 6*d.* The terms of the lease have been referred to by my Lord and the Lord Justice and I need not further detail them now. It is only at the moment convenient to observe that, while the lease contains a qualified covenant against the assignment or underletting of the demised premises or any part of them, there is no covenant against merely parting with possession. Accordingly the only change involved in the taking over of the house by the War Office to which the plaintiff by the lease was entitled to object was its subsequent user by the military authorities for purposes other than those of a private dwelling house, if and so far as the house itself was so used. Before that taking over there had been two actual assignments of the lease—the last to a Major Richardson who had died before 1918. In January, 1918, the residue of the term—it expired on Lady Day, 1919—was vested in Major Richardson's executors, of whom his widow, Mrs. Richardson, and Mr. Ogilvie, the testator's solicitor, were two. The house was unoccupied. It had apparently been dismantled after Major Richardson's death. Mrs. Richardson no longer lived there. With only a short term to run, and a great war in progress, the interest of the executors in such an unoccupied house must have been in 1918 difficult either to utilise or dispose of, and it is not therefore surprising to find, as we do find, in Mr. Ogilvie's letter of May 4, 1918, that before the military authorities took possession—probably before any intimation of such their desire or intention was even given—the executors had, but without result, offered to surrender to the plaintiff their entire holding upon terms.

On January 28, 1918, the military authorities took

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

possession and entered into occupation of the house and its immediate surroundings—an area of at the most a few acres only. The circumstances in which that possession was taken were, as I have said, not gone into at the trial; the notice of the taking referred to by the Lord Justice being apparently considered a complete statement of the position. The view of the defendant's advisers seems to have been that these circumstances were irrelevant. See Mr. Ogilvie's letter of January 29, 1920. The plaintiff's advisers do not appear to have persisted in their contrary, and in my view their correct, contention, most unfortunately as I venture to think. These circumstances were, as I have already said, in my judgment, most relevant to almost every issue in this case. Indeed if one view of them be the true view, they would without more be decisive of the rights of the parties so far at least as the two issues of frustration and eviction are concerned. For if the statement in the plaintiff's solicitor's letter of May 21, 1919, to Mr. Ogilvie be even in substance well founded—namely, that the War Office authorities took over the premises at Mrs. Richardson's request and that there was an agreement on the part of the War Office to pay a certain rent to the executors—such words as "frustration" and "eviction" have no real meaning here. And except that Mr. Ogilvie in his reply of May 24 describes the taking by the War Office under their order as the taking of a compulsory possession, which in one sense of course it was, inasmuch as the War Office had always compulsory rights to fall back upon in the absence of agreement, he in no way challenges or refers to the statement to which I have referred, while in the same letter, and in terms which do not suggest any attitude of protest or objection on the executors' side, he does allude to an interview prior to the taking of possession, at which the area to be appropriated to the War Office was apparently discussed between Captain Webb, the district officer, on the one side and Mrs. Richardson and himself on the other. And how natural! Why on the executors' part should there have been any protest against or objection to the proposed military action? Their connection with the property was

approaching its end. Mrs. Richardson's personal occupation had ceased. To them the advent of the War Office must quite properly have seemed a relief, if not indeed a godsend. Acquiescence on their part in the action was none the less patriotic, because the use to which the War Office proposed to put the premises was the internment of German prisoners of war, while that user carried with it the more substantial prospect, if not the certainty, of a complete, even a more than complete, indemnity against burdens which had become and were likely to remain onerous, and of which they had not succeeded in relieving their testator's estate by a surrender of its interest to their landlord on terms. Be this however as it may—and the matter is left in doubt, although it need not have been—it can at least with certainty be affirmed, that the only trace upon the documents of any protest against or objection to the military action in this matter comes from the plaintiff, and not from the executors, and it will be found set forth in vigorous terms in his letter to the War Office of February 6, 1918. I need not read that letter; the protest is made in the interests of the plaintiff's adjoining farm which he retained in hand, although he does not fail to point out also the unsuitability, in his view, of Offley Holes House for its proposed purpose. But the letter contains this paragraph, which is most relevant in connection with that aspect of this taking to which I am about to draw attention: "I have not been consulted at all in the matter," says the plaintiff, "as the house is at present let at a rent of 400*l.* a year"—his net quarterly rent it will be remembered was 98*l.* 2*s.* 6*d.*—"but as the lease expires in March, 1919, I am an interested party." To this letter on March 2, 1918, the War Office replied: "With reference to your letter dated February 5, 1918, on the occupation on behalf of the War Department of your house 'Offley Holes' near Hitchin by prisoners of war, I am directed to state that it is not found possible to surrender the premises at the present time, but" —these are the important words in the present connection— "the matter will receive reconsideration at the expiration of the existing lease." That is to say, as I interpret the

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

letter, the taking was a taking of the executors' interest in the premises only; when the plaintiff's interest had become an interest in possession the continuation of the military occupation would be reconsidered with him. And so on November 12, 1918, the War Office again wrote to the plaintiff: "It is regretted that no definite statement can be made as to the vacation of these premises; but if the military occupation continues after Lady Day next, any direct and substantial loss which you may thereby sustain will be the proper subject of a claim for compensation." Now it may, I think, without real risk of inaccuracy be assumed that no less definite a promise was made to the executors with reference to their interest when possession was first taken or arranged for. So much in any case does clearly emerge—namely, that the first taking being avowedly a taking only of the executors' interest, the plaintiff as landlord was neither notified nor consulted with reference to it either by the military authorities or by the executors. Whether in these circumstances such a taking was in any relevant sense as between his lessees and the plaintiff a taking by title paramount is a question to the discussion of which I will return after I have considered the other of the two matters first above referred to—namely, the relations maintained by the executors towards the plaintiff after the taking was complete. As to these everything continued as before. The full quarterly rent of 98*l.* 2*s.* 6*d.* was punctually paid by the executors on the three succeeding quarter days, and but for the fire would doubtless have been paid on the fourth and last. The executors themselves continued in the occupation of every part of the demised premises not actually held by the military authorities, an area, in point of size, although I agree not in point either of value or importance, out of all proportion to that taken over by the latter. Indeed, I am quite satisfied on the correspondence that before the fire in February, 1919, it never occurred to the executors that the taking had, or that it was to their interest to suggest that it had, worked any change whatever in their relations as tenants with the plaintiff as landlord; they maintained the

insurance upon the property as before; and while their view was that the War Office authorities were responsible in case of fire—see Mr. Ogilvie's letter to Captain Webb of May 31, 1918—they, at the instance of the military authorities, had the policy indorsed with a memorandum from the insurance office to the effect that the liability of the office remained unaffected by the change of occupation. So on September 27, 1918, before the fire, we find Mr. Ogilvie in a letter to the plaintiff's solicitors contending that the tenancy of the additional land taken under the option did not expire on March 25, 1919, like the rest, but that a year's notice to determine that tenancy was necessary. And after the fire the correspondence between the parties was still with reference to a tenancy to expire at its due date. See for instance Mr. Ogilvie's letter of March 15, 1919, with reference to the removal of fixtures by Mrs. Richardson before March 25. The first indication indeed of any change of attitude in this matter on the executors' part is to be found after the lease had actually expired—namely, in Mr. Ogilvie's letter of March 31, 1919, in which the executors denied all liability for loss caused by the fire, and this was followed on May 16, 1919, by a letter in which in answer to a claim on behalf of the plaintiff for the last quarter's rent Mr. Ogilvie stated that the executors had been advised that the exercise by the Government of their compulsory powers determined, or at any rate suspended, their liabilities under the lease. From these facts I can deduce no other conclusion than this, that the executors deliberately elected—I do not stop to consider how far in the circumstances they had any choice in the matter—but they deliberately elected to maintain in its integrity their position as tenants of the entire holding, looking to the War Office, possibly under an arrangement more or less definite, but in any case, as the *De Keyser Hotel Case* (1) has since shown, not without warrant, for compensation in respect of the premises taken by them. It is with reference, in my judgment, to that position of affairs that the liability, if any, of the defendant in respect of the claims

(1) [1920] A. C. 508.

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

made against him in this action must be determined. And here it is convenient to refer pointedly to the fact that it is Mr. Matthey, the original lessee, and not the Richardson executors, his assignees, who is defendant to the action and respondent on this appeal, as well as to the further fact that it was these executors, and not Mr. Matthey, who were the real and only actors in the matters to which I have just been referring. In my judgment, however, this is not of any importance as touching the liability of the defendant under his covenants. The transactions just referred to of the executors, his assignees, in relation to the lease bind him, in my judgment, in a question with the plaintiff as if they had been carried out by himself. The position of a lessee after assignment towards his lessor in relation to the covenants in his lease is concluded in this Court, and I doubt not in all Courts, by the decision of *Baynton* v. *Morgan*. (1) The lessee is not a surety for the assignee, any more than is the assignee the agent of the lessee. The lessee in a lease—the defendant so covenanted in this case—covenants in effect that he or his assignee will perform the covenants and observe the conditions contained in it; and when, as in the present instance, the defendant sets up no performance by himself of the covenants sued on, his defence must be either that his assignee has performed them or that his assignee is in some way as between himself and the lessor absolved from performance. *Baynton* v. *Morgan* (1) shows, amongst other things, that this last contention may not always be relied on by the lessee; and accordingly the position of the defendant is not put otherwise than favourably to himself if it is said that the measure of his liability here, that of a lessee after assignment, is the performance or non-performance of the covenants in question by his assignees when he cannot and does not aver any performance by himself. The point may in this case be very appositely illustrated by reference to the insurance covenant on which so much turns. The defendant has not insured at all. So far as he has covenanted himself to insure no performance of the

(1) 22 Q. B. D. 74.

covenant is even suggested; his defence on the insurance covenant is that his assignees have insured. If to that it can be truly replied either, as is here said, that the assignee's insurance is not a complete performance—the insurance is not in the lessor's name—or, as is also said, that all liability under the insurance covenant has been repudiated by the assignees, then the lessee has to stand the consequences, in the first case because the assignees have not duly performed the covenant, as he the lessee covenanted that they would, and in the second case because the assignees have repudiated the covenant altogether, so that the tendered performance by the assignees is as non-existent as his own. The lessee in the latter case is not made liable on the ground that the assignees were his agents to repudiate. I fully agree in the view that they were not. He is made liable on the ground that there has been no performance at all, but, on the contrary, a repudiation by the assignees of the covenant which he the lessee stipulated would be performed by them if it were not performed by himself. And that was the basis on which this action has throughout been fought, and on which the order of November 11, 1919, handing over its defence to the executors, was made. From that basis it would not, in my judgment, be right now to allow the defendant to depart, even if he wished to do so, although I have not seen that he does. And it is a basis which in law is, in a question between himself and the plaintiff, favourable to the defendant rather than otherwise; and it leaves it open for us to deal with the case, as it has throughout been dealt with, and as in all the circumstances is just as between these parties—that is, as if there had been no assignment to the executors, and as if their acts had been the acts of the defendant himself. And on that footing on the facts and circumstances above detailed it is, I think, impossible for the defendant to contend with any success that there was on January 28, 1918, when the War Office entered upon the occupation of Offley Holes House, either any frustration of the purposes for which the lease here was granted or, in any relevant sense of the words, any eviction of the executors

H. L. (E.) 1922

MATTHEY v. CURLING.

Younger L.J.

by title paramount from the demised premises or from any part of them.

As to frustration, that doctrine has never yet been extended to a lease, and, for the reason pointed out by Lush J. in *London and Northern Estates Co.* v. *Schlesinger* (1), there is a very good reason why it should not lightly be held to apply to such an instrument. Moreover it is a doctrine not to be extended: see *Bank Line* v. *Capel & Co.* (2), and when it is remembered, as Lord Sumner in that case points out so clearly (3), that the doctrine when applicable is applicable equally at the instance of either party to the bargain, and that the result of its application is to work the instant dissolution of the contract and make it incapable of renewal without a new agreement, it becomes I think clear that the doctrine can have no application to the facts of this case, lease or no lease. As I have already pointed out, the taking possession by the War Office was of itself a taking which, under the lease, the plaintiff had no power even as between himself and the executors to prevent—the subsequent user of the house itself by the War Office for purposes other than those of a private dwelling house being his only cause of complaint under the lease. And although it may well be that on the principle of *Baily* v. *De Crespigny* (4) his right of re-entry in respect of that breach of covenant was barred, it would, to my mind, have been quite impossible for the plaintiff to contend that what had happened amounted to frustration of this lease so far as his interests thereunder were concerned. And if that be so there can be no frustration at all. The circumstances bringing frustration about must be such as are equally available to both parties. If not so available, then, in a case where there are circumstances present sufficiently fundamental, as affecting his interest exclusively, to justify repudiation of the contract by one or other of the parties to it, the justification for that repudiation is no longer to be found in the doctrine of frustration, but in one which leaves it to the party so injuriously affected

(1) [1916] 1 K. B. 20, 24.
(2) [1919] A. C. 435, 459.
(3) [1919] A. C. 455.
(4) L. R. 4 Q. B. 180.

to claim relief from his obligations according as he conceives it to be or does not conceive it to be to his interest so to do. It rests with him to say whether or not the contract shall be avoided. If he does not choose to avoid it, it stands. Only thus, in any case at all like the present, could the interests of the tenant be safeguarded and not sacrificed to the ulterior interests of his landlord. This, I think, may be well illustrated by the present lease. It was here a mere accident that when the War Office took over this house the term unexpired had little more than a year to run: the house and other demised premises might have been held for a long term unexpired. Again, it was another accident that the premises were held at a rackrent; they might have been held at a low ground rent. Yet if the doctrine of frustration were held to apply by reason of such a prohibited user as took place in the present instance, the executors, however much against their interest as well as against their wish, would have lost their lease, if the plaintiff for his own purposes had sought to bring it to an end. Again, the executors had desired to surrender their entire tenancy on terms. It does not appear that they were ever willing to do so unconditionally. Yet the application of the doctrine in the circumstances to their case would have required them to do that whether they wished to or not. In short it would have deprived them of the privilege they actually exercised of relying upon their rights against the War Office in respect of its occupation of the house, while retaining the beneficial occupation of the rest of the demised premises themselves, paying the rent and performing the covenants of the lease so far as in them lay. As I have already pointed out, it never apparently occurred to the executors before the fire; nor did they intimate until long after the fire, even after the expiration of the lease by effluxion of time, that the taking of the house by the War Office had worked any change whatever in their relations as tenants to the plaintiff, their landlord, or that it was to their interest to suggest that it had. They continued their tenancy, as in my judgment they were entitled to do, for I can myself see nothing in the

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

circumstances of the taking, whether these circumstances be regarded from the point of view of the lessor or from the point of view of the lessee, or, as I think they ought necessarily to be regarded, from the point of view of the letting itself, and irrespective of the interest of the one party thereunder as contrasted with that of the other—I can see nothing in these circumstances sufficient to attract the doctrine of frustration or to justify the defendant now in setting it up and relying upon it.

And equally in my judgment there was not here any eviction by title paramount in any sense of these words relevant to the present defence. That there may have been something which might not improperly be described as an eviction from part of the demised premises I can neither affirm nor deny, for the necessary evidence on this subject was, as above appears, not given. But that the taking, even if compulsory altogether or at least in the sense that compulsion in the absence of agreement could have been used—as to which see *Harding* v. *Metropolitan Ry. Co.* (1)—amounted at most to the taking of the executors' interest or some part of that interest in the property taken on some agreed or anticipated terms of payment or indemnity is, I think, clear from the correspondence. And if this was the arrangement or expectation there is no question of eviction by title paramount in answer to a claim on covenant by the lessor: see *In re Emery and Barnett.* (2) In truth what in substance here happened was the equivalent of a compulsory taking by the War Office under the Lands Clauses Acts of the tenants' interest in a part of the demised premises for a period of time undefined in duration, the effect of which—and the cases actually arose as between the lessor and the original lessee—a reference to *Mills* v. *East London Union* (3) and *Harding* v. *Metropolitan Ry. Co.* (1) suffices to show is not to work an eviction, but to leave the lessee liable to his landlord on his original covenants unaffected by the taking. I say this advisedly, because it is, I think,

(1) L. R. 7 Ch. 154. (2) (1858) 4 C. B. (N. S.) 423.
(3) L. R. 8 C. P. 79.

quite clear, as Bailhache J. pointed out in the course of the argument in the Court below, that the only reason in the first case cited why the lessee's liability there was limited to breaches prior to the assignment was that the lessor's reversion was treated as having been acquired by the company as from the same date that the lessees' interest was acquired. In the present case there was not, as I think, in the action of the War Office, nor was there intended to be, any interference at all with the title of the plaintiff as the lessor of the premises; all that was affected or touched was the interest therein of the executors under him. In that interference with their interest the executors acquiesced; they may even have welcomed it; they looked for advantage from it; they retained their holding and continued without protest to pay their entire rent. In my judgment there was neither made, nor was there treated by the executors as having been made, in any question as between them and the plaintiff any eviction at all. Taking, as I do, that view of this matter it becomes unnecessary for me to consider how far, if the taking of the house had amounted or was even treated by the executors as amounting to such an eviction, it would have afforded any defence to the defendant in the circumstances of this case. My Lord has dealt with the case on that footing. I reach the same destination by another road.

Before I proceed to consider the defence to the plaintiff's claim for damages on which the defendant did succeed in the Court below I desire to refer to one further fact. Before the military took possession of the house the demised premises had been allowed to fall out of repair, and the plaintiff, after possession by the War Office was taken, served upon the executors a dilapidation notice prepared before that event, including within it dilapidations both upon the demised premises comprised and upon those not comprised in the military occupation. In respect of these latter dilapidations the amount of them ultimately agreed between the surveyors at 800*l.* was paid on December 20, 1919. No payment in respect of the other dilapidations, which all occurred before the military occupation, has been made, nor was any inquiry with

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

respect to them directed by the learned judge. Mr. Leslie Scott for the defendant stated to us that there could be and was no question as to the defendant's liability in respect of these. I do not think there can be, but I refer to the matter now, first because I cannot find anywhere any admission of such liability either in the correspondence or on the pleadings, or at the trial; and next because the foundation of the learned judge's decision in the defendant's favour necessarily, as it seems to me, covers and excludes these dilapidations as well as the others which succeeded them. The learned judge's decision—rejecting as he did for the reason already given the defences of frustration and eviction by title paramount—was that the defendant was discharged from further liability under both the repairing and the insurance covenants of the lease, because by reason of the occupation of the house by the military authorities—in the learned judge's opinion the equivalent of an act of State—he was prevented from yielding up the demised premises at the end of the term either in good repair or at all. The learned judge, as I read his judgment, was apparently of opinion that everything turned upon the fact that the defendant was by reason of the military occupation prevented from delivering up the premises at the end of the term. Being discharged from that obligation by reason of that act of State he was discharged also from all responsibility under his covenants for the condition of the premises as at the same date. On that view of the case it would appear to be quite irrelevant whether the actual condition of the premises at the end of the term was or was not the result of a breach of covenant prior to the act of State becoming operative, and it is, I think, no accident that the judgment of the learned judge dispenses the defendant not only from all liability for non-repair after the act of State supervened, but also from liability in respect of non-repair at its date, the existence of which his counsel before us did not feel himself in a position to dispute. Taking the view also which he did that the act of State preventing the delivery up of the premises at the end of the term extinguished the liability of the defendant with respect

to the performance of all covenants other than that for payment of rent—which was not interfered with by that intervention—the learned judge did not consider how the case against the defendant stood upon the facts, if his liability could not so summarily be disposed of. And, in my judgment, it cannot be so disposed of. The question of that liability can only, as I see it, be resolved by considering the terms of all the covenants sued on, and by determining how far, in view of the facts of the case, the defence of impossibility so strongly urged before us can prevail.

There are here four relevant covenants binding on the defendant—each of them separate. The first is a covenant for payment of rent. The second: "From time to time and at all times during the term well sufficiently and substantially to repair," etc., the demised premises, and, putting it shortly, keep them in repair. The third: "So well sufficiently and substantially repaired," etc., at the expiration of the demise to surrender the premises to the lessor. And the fourth: "To insure and keep insured against loss or damage by fire the said messuage . . . . in the joint names of the lessor and lessee . . . . and in case the said messuage . . . . or any part thereof shall at any time during the said term be destroyed or damaged by fire will forthwith lay out all moneys to be received in respect of such insurance" in reinstatement, "and in case such moneys shall be insufficient for such purpose will make good and provide the deficiency out of his own moneys." Now as to the first of these covenants it was not contested before us that the occupation by the War Office did not make its performance in any way impossible. The learned judge held on this ground that the defendant was liable for the last quarter's rent. A cross-appeal was lodged by the defendant against that decision. Mr. Leslie Scott, however, on behalf of the defendant stated to us, as I understood him, that he would not further contest the learned judge's finding on that point. I am uncertain whether Mr. Leslie Scott continued to utilise his cross-appeal to escape payment on some other ground of the whole or some part of the last quarter's rent. Whether however he did or not, it

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

must have already appeared that in my judgment he could not successfully maintain that position. As to the second of these covenants, my opinion, as I have already expressed it, is that the defence of impossibility raised by the defendant cannot properly be determined by a reference only to the terms of the notice to take possession, but must largely turn upon the nature of the taking by the War Office and on the attitude of the executors in relation to the tenancy after that taking was complete. It is for that reason that I have dealt with the issues of frustration and eviction first. I have done so advisedly. The facts and circumstances which are relevant to and in my judgment dispose of these defences are vital also, as I think, on this question of impossibility properly regarded. These facts, while they indicate much more, certainly and clearly show that the taking was a taking of the executors' interest for a period of indefinite duration, and on terms of compensation to them rightly contemplated, because now, by decision of the House of Lords in a like case (1), assured; they show that the executors, possibly in anticipation of such compensation accruing to them, but whether so or not, for their own purposes, adhered in all respects to their entire tenancy, and they show, I think, also that if any analogy to the present case is in decided cases and established principle to be found anywhere, it is to be found in such cases as those of *Mills* (2) and of *Harding* (3) already cited. I cannot myself think that the so-called impossibility of performing these repairing covenants, if that be the test, would, so far as the executors were concerned, have been any less effective, although it might have been less spectacularly obvious, if the house had been compulsorily taken for, say gasworks, than as it was for the internment of prisoners of war. And on this aspect of the case I would refer also to the following passage from the judgment in *Baily* v. *De Crespigny* (4), which seems to me to be very much in point: "No doubt, if the Legislature had in express terms, or by

(1) *Attorney-General* v. *De Keyser's Royal Hotel, Ld.* [1920] A. C. 508.
(2) L. R. 8 C. P. 79.
(3) L. R. 7 Ch. 154.
(4) L. R. 4 Q. B. 180, 188.

necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the Legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it." But I would go further. Unless it can be suggested that, although the lease was neither surrendered nor offered for surrender nor disclaimed by the executors in consequence of the occupation by the War Office, still all liability under it in respect of the repairing covenants was during the period of that occupation either non-existent or suspended or extinguished—and no trace of this position is to be found in the judgment of the learned judge, nor was it suggested before us—I do not see how the defendant can in any circumstances escape entirely from liability for non-repair during that period. All that the executors were prevented by the impossibility alleged from doing then was from entering upon the premises for the purpose of carrying out the repairs. It may well be that the cost of effecting the repairs then would have been less than the cost of effecting them when the plaintiff obtained possession. But why on that ground should the defendant be released from liability beyond the extent of the difference ? I can myself see no reason at all, while I did not gather that any suggestion was made, nor do I think it could be properly made, that liability for non-repair as distinct from the possibility of effecting it was during the period in question in any way superseded as between the plaintiff and the defendant, his lessee.

My Lord has already pointed out in relation to this covenant, that no leave to enter the premises for the purpose of performing it was either asked for or refused ; and after the fire at least, after which as I think we were told the prisoners were removed, there is no obvious reason why if it had been asked for it should have been refused. In other words my Lord has shown that it was not established that the position, whether of the defendant or of the executors, was during the relevant period in any way different from that of any lessee who is

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

sued after the assignment of his term on the repairing covenants contained in his lease. I agree with him; but again I reach the same destination by another road.

An altogether different question arises under the fourth covenant. It was contended by Mr. Scott and Mr. Foà on this covenant that the obligation under it to apply the insurance moneys when received in reinstatement had ceased to be operative, because the obligation did not arise until the insurance moneys had been received; that those were not received before the expiration of the term; and that with the expiration of the lease liability on that covenant came to an end. With that contention I do not agree. The fire referred to in the covenant may, in accordance with its express terms, take place at any time during the term, even, that is, on the very last day of it, and in my opinion the liability of the lessee with reference to the application of the insurance money and reinstatement is the same in relation to such a fire as to one happening earlier in the term, with only this difference, that if the lessee is prevented by his lessor from re-entering upon the premises for the purpose of carrying out the work of reinstatement his liability in that behalf is at an end: see the note to *Morrison* v. *Chadwick* (1), which embodies as it seems to me a true principle. I myself take the view that the obligation to reinstate does not arise until the insurance moneys are without default received. I think that on the true construction of this covenant the personal liability of the lessee to apply his own moneys only extends to the deficiency referred to in the covenant; but I was unable to follow Mr. Foà's argument that, because most of the covenants in the lease were expressly limited to the duration of the term, and because in the case of two others where these words were omitted the obligation could not from the nature of the case extend beyond the term, therefore the omission of the words of limitation in the covenant now in question was to be ignored, although the result in the case of a fire occurring at the end of the term would be to make the

(1) (1849) 7 C. B. 266, 284, note *a*.

covenant valueless. If it is to be implied that every covenant in a lease operates only during its continuance, the wonder surely rather is that such a covenant is ever expressly limited. Such a limitation is on that footing quite superfluous. Nor, as I think, can any support for Mr. Foà's view be drawn from the covenant to repair and keep in repair during the term. The breach, if any, of that covenant at the end of the term is complete; the damage has been done; a right of action has accrued. It is otherwise with the reinstatement covenant. If the obligation under that part of the insurance covenant arises, as I think it does, only on receipt of the insurance money, there can be no breach of that covenant until the moneys have been received, which may, as in the present case, if they are received at all, be at a time long after the end of the term. In other words this particular obligation is sui generis, and, as I think, it must be construed accordingly, if the covenant is to be operative in accordance with what appears at least to me to be its plain purpose and intent. It was suggested that the difficulty would be avoided by the lessor resorting for his protection in this matter to s. 83 of the Fires Prevention (Metropolis) Act, 1774. But I fear that would neither give him protection nor remove the difficulty which suggested resort being had to the statute. For, first, if the assured themselves are held to be under these covenants free of their liability they cease to have an insurable interest under the policy. Under such a policy the tenant can only recover what he loses: *Castellain* v. *Preston* (1); the statute does not enable the lessor, as a person interested, to require payment of moneys for which the assured can make no claim. But further the landlord cannot under the statute demand the money from the insurance company; the company must itself do the rebuilding: see *Simpson* v. *Scottish Union Insurance Co.* (2), presumably under licence from the lessor, the terms of which are no more prescribed by the statute than they are in this case by the lease. May it not indeed be that this common form of reinstatement covenant

(1) (1883) 11 Q. B. D. 380, 400. (2) (1863) 1 H. & M. 618.

H. L. (E.) 1922 MATTHEY v. CURLING. Younger L.J.

is based upon the statute, and for this reason also should have effect in accordance with its express terms ?

But it is said that if the above be the true construction of the covenant, the action in respect of it is premature, because at the date of the writ the insurance moneys had not been received. This point is not pleaded ; but I do not think it would have availed the defendant even if it had been. As I have said, on March 31 the executors repudiated all liability for loss from the fire. That repudiation is pleaded. From that position they have never receded. I have already given my reasons for the view that the defendant is bound by that repudiation, and he being, as I hold, liable under his insurance covenant in respect of the fire, his liability thereunder in damages must, in my judgment, be ascertained as at the date of that repudiation ; in other words, he is liable to pay the cost of reinstatement as at that date.

It remains only to deal with the third covenant—the covenant to deliver up in repair. The defendant is, I agree, absolved from liability in respect of his covenant to deliver up, but in my judgment he is absolved from no more.

In the view I take of the liability of the defendant under the insurance covenant, it becomes unnecessary for me to deal with the omission to insure in joint names. The omission in the view I take of the case has ceased to be important. In other circumstances it might have lost both to the plaintiff and to the defendant any benefit from the insurance moneys and would have made it necessary very carefully to consider what, in view of what took place on that subject in the Court below, is now in respect of that breach the position of the defendant.

On the whole case the plaintiff is, in my judgment, entitled to an inquiry as to the damages sustained by him in consequence of the repudiation of the insurance covenant, and a further inquiry under the covenant to repair for any dilapidations not already provided for to premises not burnt, for which accordingly no reinstatement moneys are provided

in the damages awarded under the insurance covenant. Alternatively the whole sum the plaintiff is entitled to may be reached on an inquiry as to the damage sustained by the breach of the covenant to keep in repair. It will be for the defendant to obtain relief from his liability under the first head of damage, and from any liability under the second in respect of dilapidations since the military occupation, both from the insurance office and from the military authorities. All that need be said with reference to both claims to relief is, that they will not be confronted with such difficulties as would clearly beset the only claim left to the plaintiff if the learned judge's judgment had stood.

The cross-appeal of the defendant should, I think, stand dismissed.

Feb. 14, 16, 17. *Leslie Scott K.C.* and *Edgar Foà* for the appellant. From the date when the War Office acting under their statutory powers took possession of the premises performance of the covenants relating to repairs and insurance was rendered impossible by an act of State and operation of the law and was excused, it being an implied condition of the contract of demise that the lessee or his assigns should be allowed to continue in possession and enjoyment of the demised premises: *Baily* v. *De Crespigny* (1); *Mills* v. *East London Union* (2); *Brewster* v. *Kitchell.* (3) As to the rent, the taking of possession of the house and garden by the military authorities amounted to an eviction by title paramount, and thereupon the tenant ceased to be liable for payment of the rent of so much of the demised premises as was taken out of his possession. In the case of an eviction by the landlord from part of the demised premises no rent can be recovered, but where the eviction is by title paramount there is an apportionment of the rent: Gilbert on Rents, pp. 145–147; *Salmon* v. *Smith* (4); *Smith* v.

(1) L. R. 4 Q. B. 180.
(2) L. R. 8 C. P. 79, 84.
(3) (1697) 1 Salk. 198.
(4) (1669) 1 Wms. Saund. 202, 204, note (2), note *f.*

H. L. (E.) 1922 MATTHEY v. CURLING.

Raleigh (1); *Morrison* v. *Chadwick*. (2) It is said that nothing short of taking the interest will effect an eviction, but the essence of eviction, as is shown by *Salmon* v. *Smith* (3), is the turning the tenant out of possession, provided it amounts to something more than a mere trespass: *Upton* v. *Townend*. (4) In *Whitehall Court* v. *Ettlinger* (5) the Court was wrong in holding that there was no eviction. The judgment of Atkin L.J. expresses the appellant's argument.

Maugham K.C. and *C. M. Pitman* for the respondent. The War Office have had no dealings with the respondent, the lessor. The occupation of the War Office is an interference with the rights of Major Richardson's executors and for that they have a clear right of compensation against the Crown: it in no way affects the rights of the lessor. This is not eviction by title paramount: *Paradine* v. *Jane* (6), but the War Office were acting under the powers conferred by the Defence Act, 1842, ss. 16, 19, which empowered them to take possession and required them to pay compensation: *Attorney-General* v. *De Keyser's Royal Hotel*. (7) In substance this was a case of vendor and purchaser. The executors continued paying rent to the respondent and made no demand against the War Office for an apportioned part of the rent. In no case in the books has a tenant ever been held excused from complying with his covenants on the ground of impossibility, where he has a right over against a third party. The tenant remains tenant and so far as his interest has been interfered with the War Office must pay him for that interference. *Baily* v. *De Crespigny* (8) was not a case of landlord and tenant, and if it had been it is submitted that the decision would have been the other way. In *Mills* v. *East London Union* (9) there was no decision on the point at issue and the dictum of Grove J. in that case was wrong. In

(1) (1814) 3 Camp. 513.
(2) 7 C. B. 266.
(3) 1 Wms. Saund. 202.
(4) (1855) 25 L. J. (C. P.) 44.
(5) [1920] 1 K. B. 680.
(6) (1647) Aleyn, 26.
(7) [1920] A. C. 508.
(8) L. R. 4 Q. B. 180.
(9) L. R. 8 C. P. 79, 84.

Harding v. *Metropolitan Ry. Co.* (1), where a railway company in exercise of its compulsory powers purchased a leasehold interest, Lord Hatherley assumed that the tenant remained liable on the whole of his covenants in the lease.

[They also referred to *Auriol* v. *Mills* (2); *Hornby* v. *Houlditch* (3); and *Wainwright* v. *Ramsden.* (4)]

There is no authority for saying that a tenant is not liable on the covenants in his lease because his interest, or some part of it, has been taken compulsorily by a superior power. Here a portion only of the demised premises has been taken, and the covenants are not apportionable; and ex concessis the covenants remain in force as to the portion not taken. The result is that the tenant remains liable on all his covenants and that in the events which have happened nothing has put an end to that liability.

[The question whether the liability of the lessee under the covenant to reinstate ceased on the expiration of the term was also argued.]

Leslie Scott K.C. replied.

The House took time for consideration.

1922. March 21. LORD BUCKMASTER. My Lords, the appellant in this case was lessee, under a lease granted to him by the respondent, of a dwelling house and lands, known as Offley Holes in the county of Hertford, at a yearly rent of 300*l.* The lease was dated March 25, 1898, and the term granted was twenty-one years. The lease contained the usual covenants, to pay the rent, to keep in repair, to deliver up in repair at the end of the term, to effect an insurance against fire, in the joint names of the lessor and the lessee in the sum of 7000*l.*, and, in case of fire occurring during the term, to apply the insurance moneys in reinstatement.

(1) L. R. 7 Ch. 154, 159.
(2) (1790) 4 T. R. 94.
(3) (1737) Andr. 40; 1 T. R. 93, note (*a*).
(4) (1839) 5 M. & W. 602; 9 L. J. (Ex.) 120.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Buckmaster.

Further lands were added to the lease, bringing the total rent up to a sum of 392*l.* 10*s.* Divers mesne assignments of the lease occurred, the last assignee being Robert Mervyn Richardson, who died on March 6, 1917, so that the term granted by the lease became from that date, and remained until the expiration of the twenty-one years, vested in his executors. On January 29, 1918, Colonel Newenham, acting on behalf of the War Office, and as the competent military authority, by virtue of the powers conferred by reg. 2 under the Defence of the Realm Consolidation Regulation Act of 1914, took possession of the house, premises, and gardens. Possession was not taken of the entire property subject to the lease, but it is not necessary, for the purposes of this appeal, to determine the exact area that was unaffected by the notice. The premises were used for the internment of German prisoners, and on February 12, 1919, while the occupation of the military authority still continued, the house was completely destroyed by fire. On March 25, the term granted by the lease expired by effluxion of time, and on June 4, 1919, possession of the premises was given up to the respondents by the military authority, who had continued in uninterrupted possession from the time when they first entered. The house being completely lost, it was obvious that some one ought to be responsible for its restoration, and that obligation would naturally fall upon the military authority, during whose possession the fire had occurred. In these circumstances, it would appear that the adjustment of the dispute was a matter of extreme simplicity. There could be no question as to any different measure of damages whether the lessee or the lessor was the person entitled to put forward the claim. All that was required was to assess the amount properly payable and hand it over to the lessor. On application, however, being made to the War Office by the executors of the assignee of the lease for this relief, the War Office replied, on February 21, 1919, denying liability, and stating that a military court of inquiry had been held, the result of which would be forwarded to the War Office. Nothing being done in the matter, on April 3,

1919, the solicitor for the executors again wrote to the War Office in the matter, and it is as well, in view of the reply, that this letter should be stated in full. It was as follows :—

"32, Essex-street,
Strand, W.C.
April 3, 1919.

Major-General i/c Administration.
Eastern Command, 50, Pall-mall, S.W.

Sir,—

E.C. No. 7/24324/Q.
Fire of Offley Holes.

Referring to our previous correspondence in this matter, Mr. Curling, the owner of the freehold, is now calling upon the lessee to rebuild the property, or pay the cost thereof. The lessee will in his turn call upon my clients. I am, therefore, writing to ask, before proceedings are commenced, whether your denial of liability is serious and whether you intend to persist in it.

If the War Office intend to contest my clients' claim, I assume that I should communicate with the Treasury Solicitor, Whitehall, but in meantime, I shall be pleased to call and see you, if you think my doing so will assist in avoiding litigation.

Yours obediently,
C. E. W. Ogilvie."

To this an answer was received on April 23 in the following terms :—

"C.R., E.C. 7/24324/Q.

C. E. W. Ogilvie, Esq.,
32, Essex-street, Strand, W.C.2.
Fire at Offley Holes.

Sir,—In reply to your letter of the 3rd instant on this matter, I am directed to state that the inquiries made into the cause of the fire do not tend to show that it was due to negligence on the part of any one for whom the Military Authorities are responsible, and in the circumstances

H. L. (E.) 1922

MATTHEY v. CURLING.

Lord Buckmaster.

it is regretted that liability for the damage cannot be accepted.

I am, Sir, your obedient servant,
Cholmely Bell,
Lieutenant-Colonel, A.Q.M.G.,
for Major-General i/c Administration,
Eastern Command.

50, Pall-mall, S.W.1,
April 23, 1919."

The War Office are not parties to this litigation, and it has, therefore, been impossible to ascertain what is the suggested explanation—I might indeed say excuse—for the attitude that they adopted; but I find it difficult to understand on what ground or by what authority any Government is at liberty, having dispossessed a man of his property, to refuse responsibility for its restoration when their occupation ceased. The result of their action was inevitable; the lessor took the proceedings out of which this appeal has arisen, claiming against the lessee the amount for non-payment of rent and damages for breaches of covenant, and it necessarily followed that whatever might be the result of that litigation, the entire cost must be thrown upon one of two completely innocent parties. The controversy before this House is, however, confined to the question of liability as between lessor and lessee. Rent was paid to the lessor by the lessee up to and including the rent due on December 25, 1918. The quarter's rent, therefore, up to March 25, 1919, and the damages for breach of covenant are the questions that now come forward for determination.

The defences to these two branches of the claim vary. As to the first, the lessees say that they were evicted by title or by authority which they could not withstand; while as to the second, in addition to the former defence, they rely on the allegation that they were prevented by superior force from performance of the covenants. In my opinion both these defences fail. There has been throughout the case some confusion as to what constitutes a defence on the ground of eviction by

title paramount. It is assumed that this means by an act which the lessee could not control; but there is no trace of such a doctrine in any of the authorities. Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent. Eviction by the lessor himself is with equal reason an answer to the claim upon the covenant, and in such a case, as Jervis C.J. said in *Upton* v. *Townend* (1), the question is whether there is an eviction in fact, and whether the plaintiff (that is, the lessor) was a party to it, and again, later on in the judgment, he repeats "it is for the jury to say whether the act was done by the landlord, and whether it was done with the intention of depriving the tenant of the enjoyment." But mere eviction has never been held to have this effect. In *Paradine* v. *Jane* (2) eviction of a tenant took place by the action of Prince Rupert, and it was held that this did not relieve the lessee of liability. The force was undoubtedly superior force, but it was said that it was unlawfully exercised. I am unable to see that this constitutes any real distinction; the question for consideration is how far the lessor has been deprived of the benefit of his covenant, and an act lawfully or unlawfully done, for which he is in no way responsible, cannot, in my opinion, have that effect, unless the covenant can be construed as excluding the event. It was, however, urged that there were authorities to the contrary effect, and the one chiefly relied on was the case of *Baily* v. *De Crespigny*. (3) In that case a lessor had demised property and had entered into a covenant with the lessee that neither he nor his assigns would permit building upon a paddock that fronted the demised premises. A railway company acquired this paddock under compulsory powers, and erected on it urinals and other unsightly buildings. The lessee claimed damages against the lessor for breach of his covenant, and it was held that he could not recover. I cannot help thinking that the real ground of

(1) 25 L. J. (C. P.) 44, 51. (2) Aleyn, 26.
(3) L. R. 4 Q. B. 180.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Buckmaster.

this decision is to be found in the passage of Hannen J. (1) where he says that if an event happens of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. The learned judge then points out that the word "assigns" in the covenant under which alone the lessor could have been made responsible was intended to have a definite meaning, which was that the lessor was able to foresee and guard against the liabilities which might arise from his contract. The Legislature by compelling him to part with his land to a railway company whom he could not bind, had created a new kind of assign which was not in the contemplation of the parties. I find myself unable to think that this has any application to a covenant entered into by a lessee, either to pay rent or to deliver up the premises. He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance. Acts that would have been done by any sub-tenant or assignee of the premises might equally have been beyond his control, and it does not seem to me to make any difference that in the one case he would have allowed the occupation which resulted in the loss and in the other he did not.

The case of *Mills* v. *The Union of East London* (2) affords little assistance for the point was never argued. The real decision was as to the liability of a lessee for damages on a repairing covenant between February, 1866, when a notice to treat was served upon him, and November 21, 1870, when the lease was assigned to the Union. It was held that liability continued up to the later date, but Keating J. points out that the "parties have agreed that the intermediate time between the date" (21st Nov., 1870) "and the commencement of the action is of no importance," and Denman J. adds that "The argument has been confined to the question

(1) L. R. 4 Q. B. 185. (2) L. R. 8 C. P. 79, 84, 86.

whether the liability enured until the 21st of November, 1870." These statements remove the weight that would otherwise attach to the dictum of Grove J., that where possession passed to the railway company "the defendants could not effect the repairs and their liability ceased." This case was subsequent to the case of *Harding* v. *Metropolitan Ry. Co.* (1), and Denman J. supports his judgment by that authority. But when examined, *Harding* v. *Metropolitan Ry. Co.* (1) appears to me fatal to the appellant's contention. In that case a railway company had acquired, under their compulsory powers, certain leasehold premises, the lessee required that they should accept an assignment of the property with the usual indemnity, and this they refused to do. Lord Hatherley, in deciding that they must be compelled to accept such an assignment, used the following words (2): "As to the abstract principle, I have no doubt that a company purchasing a leasehold interest, as this company has done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who is unwilling to dispose of it, and to leave him subject to a substantial rent of £600 a year, and to the other covenants and conditions of his lease." That statement has never been questioned, has formed the foundation of procedure from that date, and to my mind is an accurate statement of the true position in such circumstances; but if it be accepted, the appellant's defence is taken away, for it establishes the proposition that the lessee remains liable on his covenants in the lease, notwithstanding that he has been deprived of the term by the exercise of legal powers. In the present instance it is true that there was no assignment, nor do I think that the War Office intended to acquire the leasehold interest. They entered into possession by virtue of the authority conferred by the Defence Act of 1842, which empowered them to take, and compelled them to pay compensation as therein

(1) L. R. 7 Ch. 154. (2) Ibid. 159.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Buckmaster.

provided: *Attorney-General* v. *De Keyser's Royal Hotel.* (1) The preliminary conditions and restrictions imposed by this Act were removed by the statute of 1914, and the regulations made thereunder, but though this prevented the necessity for formal vesting by assignment or otherwise in the Crown, it left untouched the liability to make the compensation. It is, therefore, closely analogous to—though it is not identical with—the compulsory acquisition by a railway company, and there is no principle upon which it is possible to hold that the lessee remains liable to the lessor in the one case and not in the other. The first part of the argument therefore must fail.

The second, so far as it is not embraced in the first, depends upon a slightly different contention. It is said that performance had become impossible, and that consequently it must be excused. Impossibility of performance is a phrase that is often lightly and loosely used in connection with contractual obligations. There is no question here of performance having become impossible owing to its prohibition by statute, for no law has prohibited performance, though enjoyment of the premises has been interfered with by legal powers. Further, I entertain grave doubt whether there was any impossibility in fact at all. At any rate, I am satisfied that a terminable occupation by military authorities during an uncertain time, for which compensation may prove to be recoverable, constitutes no answer to the obligations of this repairing covenant. It thus becomes unnecessary to express any opinion about the covenants to insure and to apply the insurance moneys in reinstating the premises. For the reasons given I think that this appeal must fail, and should be dismissed with costs.

LORD ATKINSON. My Lords, I concur. It is, I think, essential, in this case, to ascertain clearly and bear in mind what is the true nature and extent of the right or interest which the officers of the Crown have acquired, in trust for

(1) [1920] A. C. 508.

His Majesty, in a portion of the appellant's leasehold premises, and what are the conditions upon which that right or interest has been acquired. This is all the more necessary, because the case has been occasionally treated in argument as if the Crown had become the compulsory assignee of all the estate and interest of the appellant in the portion of the leasehold premises occupied by these officers.

Sect. 18 of the Defence Act of 1842 (5 & 6 Vict. c. 94) provides that the several persons and bodies therein mentioned are thereby, respectively, empowered to contract and agree with the officers of the Crown, therein described, for the absolute sale of any of the hereditaments therein mentioned, or for the grant of a lease thereof, either for a term of years certain or for such period as the exigency of the public service may require, and to convey, surrender, demise or grant the same to such officers in trust for His Majesty. By s. 19 of this same statute it is provided that in case the persons or bodies in the previous section mentioned shall decline to treat or agree with the aforesaid officers, or refuse to accept the sum of money offered by the latter for the absolute sale of any of the before-mentioned hereditaments, or such annual rent or sum for the hire thereof, either for a term certain, or for such period as the exigencies of the public service may require, then these principal officers are, by the authorities named, to be put into immediate possession of the hereditaments or premises they desired to acquire or hire, and a jury are to be empanelled to find the compensation to be paid either for the absolute purchase of the property desired to be acquired or for the "possession *or use*" thereof as the case may be. The Defence of the Realm Consolidation Act, 1914, and the regulations made thereunder have altered the machinery by which this compensation is to be fixed, and this entry into possession effected, but, as was decided in the *Attorney-General* v. *De Keyser's Royal Hotel* (1), they have not altered the nature of the interest which can be acquired in trust for His Majesty, nor taken away or abridged the right of the

(1) [1920] A. C. 508.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Atkinson.

owners of that interest to receive compensation, which it must, I think, be assumed will in every case be adequate. The lease under which the appellant held these premises was not in any degree, or to any extent invalidated. His title to the hereditament demised was not in any way weakened. He had, no doubt, been inconvenienced by being deprived of the occupation or use of a portion of the demised premises, but nothing could less resemble in cause, character or nature eviction by title paramount, than what has happened.

Eviction by title paramount has in *Neale* v. *Mackenzie* (1) been, by Lord Denman, defined or described to be "eviction by a title superior to the titles both of lessor and lessee; *against which neither is enabled to make a defence.*" The case of *Doe* v. *Meyler* (2) is a good example of an eviction of a portion of demised premises by title paramount, requiring the rent reserved to be consequently apportioned. There, a lessor who was seised in fee of certain lands, and was also entitled as tenant for life to other land, with a leasing power, leased both lands, reserving one entire undivided rent for the two. On his death the lease of the land of which he had been tenant for life was impeached on the ground that it was not warranted by the power. It was held void, and the rent was apportioned. The decision was rested on the dictum in Co. Lit. 148*b*, that if a man be seised of two acres of land, one in fee and the other in tail, and make a lease for life or for years of both acres and on his death the issue in tail avoid the lease, the rent will be apportioned.

The only reason for this rule of law apparently is that the lessee loses, not merely the use and enjoyment of the portion of the demised premises from which he has been evicted, but all right and title to any estate or interest in it, although the rent reserved issues out of it together with the residue of the leasehold. I cannot find any case in which the rent reserved by a lease was apportioned simply because the lessee was deprived of the use and enjoyment of a portion of the

(1) (1836) 1 M. & W. 747, 759. (2) (1814) 2 M. & S. 276.

demised premises, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such a result.

Mr. Leslie Scott based his argument on behalf of the appellant on the question of apportionment of the rent reserved on the ground that his client was by an act of a supreme authority deprived of the enjoyment of a portion of his leasehold property. But a man who is the lessee of his dwelling house with the grounds around it cannot be more completely deprived of the use and enjoyment of this house than if it be destroyed by fire, yet the rent reserved is not apportioned though the dwelling house may have been the most valuable portion of the premises demised, and its existence may have been the man's principal inducement to become the lessee of it: *Monk* v. *Cooper*. (1) There, the lease contained a covenant to repair the premises except they were demolished by fire. The lessee was sued for a year's rent. He pleaded that before the beginning of the year for which the rent was claimed, the premises were, against his will, destroyed by fire, that they were not rebuilt by the plaintiff during the whole year for which the rent was demanded, and that therefore the defendant had not had any enjoyment of the premises. This plea was demurred to and was held to be bad, the Court observing: "If the defendant has any injury, he will have his remedy; but he cannot set it off against the demand for rent. The plaintiff must have judgment": *Marshall* v. *Schofield* (2) to same effect.

The same principle applies if the demised premises be carried away by an extraordinary flood: *Carter* v. *Cummins* (3); or be occupied by an alien enemy: *Paradine* v. *Jane*. (4) It was in this later case resolved by the Court that "if the lessee covenant to repair a house, though it be burnt by lightning, ... yet he ought to repair it." "When the party by his own contract creates a duty or charge

(1) (1727) 2 Stra. 763.
(2) (1882) 52 L. J. (Q. B.) 58.
(3) Cited in 1 Cas. in Ch. 84.
(4) Aleyn, 26.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Atkinson.

upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract." "Where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over there the law will excuse him." "The rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question, but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations."

In *Atkinson* v. *Richie* (1) Lord Ellenborough said: "The rule laid down in the case of *Paradine* v. *Jane*, Aleyn 26, has been often recognized in courts of law, as a sound one; i.e. that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.'" This statement of the law is quoted with approval by Lord Denman C.J., Patteson and Wightman JJ., in *Spence* v. *Chodwick*. (2)

In *Lloyd* v. *Guibert* (3) Willes J., delivering the judgment of the Exchequer Chamber, expresses approval of it, stating the rule to be that by the common law of England a person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance because of being prevented by the Act of God or the King's enemies, and in *Jacobs* v. *Crédit Lyonnais* (4) Bowen L.J. (as he then was), when delivering the judgment in the Court of Appeal, said: "Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major." He

(1) (1809) 10 East, 530, 533.
(2) (1847) 10 Q. B. 517.
(3) (1865) L. R. 1 Q. B. 115, 121.
(4) (1884) 12 Q. B. D. 589, 603.

then cites *Paradine* v. *Jane* (1) in support of this proposition. This last-named case must, therefore, I think, be recognized as one of well-established authority.

On this principle it was in *Belfour* v. *Weston* (2) decided that a lessee who covenants to pay rent, and to repair with express exception of casualties by fire, is liable on the covenant for rent, though the premises were not rebuilt by the lessor after notice. Again, another instance in which the lessee is deprived of the enjoyment of part of the demised premises, is where the lessor tortiously evicts the lessee from that part. The effect of such an act was dealt with in *Morrison* v. *Chadwick* (3), and it was decided that such an eviction creates a suspension of the entire rent during its continuance, but that the tenancy is not thereby put an end to, nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent. Coltman J., in delivering the judgment of the Court, made the following observations which are rather applicable to this case. He said: "It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain satisfaction for any inconvenience and loss which he may suffer."

The last case I think it necessary to refer to relates to the consequences of a surrender by the lessee of part of a demised premises. It is *Baynton* v. *Morgan*. (4) In this case the plaintiff demised to the defendant by deed a house and premises for twenty-one years at a rent of 50*l*. per annum. The lessee covenanted in the ordinary way for himself, his executors, administrators and assigns to pay this rent. The

(1) Aleyn, 26.
(2) (1786) 1 T. R. 310.
(3) 7 C. B. 266, 283.
(4) 22 Q. B. D. 74, 79.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Atkinson.

defendant assigned to a third party all his interest in a portion of the premises. This third party with the assent of the lessee surrendered to the landlord the part so assigned to him. The quarter's rent of 12*l.* 10*s.*, due September, 1887, not having been paid, the plaintiff sued the lessee to recover the quarter's rent less 1*l.*, the apportioned part of the rent in respect of the portion of the premises surrendered. The plaintiff agreed at the trial to take judgment for the quarter's rent less the 1*l.*—namely, 11*l.* 10*s.* It was held that the liability of the defendant on the covenant was not extinguished by the surrender of part of the premises, that he still remained liable thereon, at all events for the amount claimed. Lord Esher, after having pointed out that nothing in the nature of an eviction by the lessor (which is something wrongfully done by him) had occurred, said: "It is no doubt true that the original consideration, which in fact existed, ... has been altered; for, such consideration being the enjoyment of the premises for a certain term, a part of the premises is no longer enjoyed; and, that being so, it is suggested that the whole of the rent can no longer be payable, and that the covenant cannot be apportioned, and therefore is gone altogether. It is not necessary under the circumstances to decide whether there can be an apportionment for the purposes of the covenant or not. If there cannot be an apportionment, I think the result is that the defendant must pay the whole. I am not prepared to say that, because there cannot be an apportionment, therefore the covenant is wholly gone. There does not appear to me to be any authority for that proposition, and in fact, so far as they go, the authorities to which our attention has been called seem to tend the other way. . . . . It is only necessary for the purposes of this case to decide that the surrender of part of the premises by the assignee did not destroy the covenant altogether." Fry and Lopes L.JJ. concurred in these views. It cannot in my view make any difference in the result if the lessee be deprived of the use and enjoyment of his premises by the exercise by the Crown of powers conferred upon it by statute.

I am clearly of opinion on principle and authority that the rent payable by the appellant in this case was not, on the facts, apportionable, that the appellant is bound by the covenants of his lease, and that, save with one exception, to be presently dealt with, he is not excused from performing them. I think the case of the *Whitehall Court* v. *Ettlinger* (1) was rightly decided. In *Moule* v. *Garrett* (2) it was decided by the Exchequer Chamber that an assignee of a lease by mesne assignment is bound to indemnify the original lessee against the breach of covenant of the lease committed during his own tenancy. And Lord Hatherley in *Harding* v. *Metropolitan Ry. Co.* (3) says that the rule that the purchaser of a leasehold is bound to indemnify his vendor against the rent and covenants contained in the lease applies equally to a compulsory purchase made by a railway company under the Lands Clauses Act.

It is in the next place necessary to consider what is the effect of the events which have happened on the four following covenants by the lessee contained in the lease under which the appellant held :—

1. The covenant to keep the demised premises in repair during the continuance of the lease.

2. The covenant to peaceably surrender the demised premises well and substantially repaired and maintained at the expiration or sooner determination of the demise.

3. The covenant to insure and keep insured against loss or damage by fire the messuage and buildings for a sum of 7000*l.* at least by the Phœnix Fire Office, or any other fire office, to be approved in writing by the lessor in the joint names of the lessor and the lessee. And

4. The covenant that in case the messuage and buildings should at any time during the term be destroyed or damaged by fire to forthwith lay out all moneys received in respect of the insurance on rebuilding, repairing and reinstating in a good and substantial manner the said messuage and buildings, and in case the aforesaid moneys should be insufficient, to

(1) [1920] 1 K. B. 680. (2) (1872) L. R. 7 Ex. 101.
(3) L. R. 7 Ch. 154.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Atkinson.

make good the deficiency out of the appellant's own moneys. The military authorities continued in possession till June 4, 1919, when they gave it up to the respondent. The lease had expired by effluxion of time on March 25 previous, and the dwelling house was burned about six weeks before the latter date—namely, on February 15, 1919. In March, 1918, a survey of the state of the premises was made on behalf of the respondent and a schedule of dilapidations was prepared and served upon the appellant on June 13, 1918. A fresh policy of insurance was effected on the premises by the appellant in his own name alone, not as required by the covenant, in the joint names of the lessor and lessee, and the amount of the policy has been received by the appellant. During the year 1918, the appellant in performance of his covenant in the lease paid the rent reserved. It was contended on behalf of the appellant: (1.) That the possession by the military while it lasted rendered the performance of the covenant to repair impossible. (2.) That for the same reason the performance of the covenant to yield up the premises in good repair at the expiration of the term was rendered impossible. (3.) That for the like reasons the performance of the covenant to lay out all the moneys (admittedly received) in respect of the insurance, in rebuilding and reinstating the premises was rendered impossible, and that, therefore, in each of these three cases the performance of these covenants by the appellant was excused. No doubt the last-mentioned covenant provides that if the premises should be damaged by fire during the term, then the lessee shall forthwith lay out the moneys to be received in respect of the insurance in rebuilding and reinstating the premises. That in my opinion does not mean that the appellant is bound to anticipate the receipt of the amount of the policy of insurance, and out of his own proper moneys at once commence to build, and continue to defray the cost of building, till the premises have been reinstated, but merely that he is on receipt of the moneys in respect of the insurance forthwith to expend it in reinstating the premises. If these moneys should prove insufficient, the appellant is then, but only then, burdened

with any payment towards reinstating the premises. The liability of the appellant for the breach during the term of the covenant to repair in respect of the portion of the premises of which the military officers had not taken possession has, I understand, been settled by the parties.

Of course, if there has been any similar breach of covenant in relation to the portion of the premises taken possession of on behalf of the Crown, the appellant will be liable for it. Owing to the date at which the fire took place and the fact that the military officers were in occupation on behalf of the Crown till June 4, 1919, I assume it was physically impossible for the appellant to have delivered up the possession of the demised premises as he was by the covenant bound to do in good repair and condition at the termination of the lease on March 25, 1919. But the covenant to deliver up in repair was absolute in form, and having regard to the decision in *Brown* v. *Royal Insurance Co.* (1) I have the very gravest doubt whether the performance of this covenant can be excused by reason of that impossibility. As to the covenant to reinstate, the case is, in my view, altogether different. It has been contended that the appellant was bound to perform this covenant before the termination of the lease, which of course was physically impossible. I do not know upon what principle of law this contention is based. The language of the covenant, which is " to lay out the moneys to be received in respect of the insurance in reinstating the premises," appears to me to be quite inconsistent with any such construction of it. No particular time is definitely fixed within which this covenant is to be performed. To hold that such a covenant must be performed while the lease is current would reduce it in many instances to a mere mockery. Dwelling houses and mansion houses cannot be rebuilt by magic, and without that, it would be quite impossible to reinstate them, if they were consumed by fire within perhaps a few months of the end of the term of the leases under which they were respectively held. Besides, it has not been indicated at all what is to become of the policy of insurance in such a case.

(1) (1859) 1 E. & E. 853.

H. L. (E.) 1922 MATTHEY v. CURLING. Lord Atkinson.

Is the amount of it to be paid, or is the company which may have been receiving the premium for years to be entitled to refuse to pay it? And if it should be paid, but not till a day or a week after the term has ended, how is the money to be disposed of? In the present case the policy of insurance dated July 13, 1918, was paid, but at a date that is not stated.

In any case where the fire occurred near the end of the term of the lease and the insurance company contested its liability, even unsuccessfully, the amount of the policy would not be received during the term. The very fact that the lessor was in this case insisting on the performance by the lessee of the latter's covenant to reinstate, necessarily implied that, so far as he was concerned, he consented to the lessee and his authorized agents entering on the demised premises to commence and complete that work. It is much to be regretted, I think, that the appellant did not apply to the War Department for a like consent and permission, but after all the military only remained in occupation till June 4.

We have not been referred to any authority establishing that in such a case as this reinstatement must take place within the term of the lease. Nor have I myself been able to find one. Until I have been referred to it, or discovered it, I fear I shall remain of opinion that in the case of an ordinary covenant to reinstate, a covenantor shall in the absence of words expressly or impliedly fixing a time for the performance of his covenant, have what is a reasonable time under all the circumstances of the case for its performance, whether, in the case of a leasehold, that time extends beyond the term or the contrary.

The respondent cannot, however, have redress both in meal and malt. He cannot be entitled to have a dwelling house rebuilt for him under the covenant to reinstate, and to recover, under the covenant to deliver up in repair, damages because possession of the premises leased has been delivered up without any house upon them. Thus the two covenants overlap, and for practical purposes have, to a great

extent, been merged in one another. If the dwelling house and other buildings be reinstated the damages recoverable for the breach of the other covenant must necessarily be trifling.

One has some difficulty in dealing with the covenant to insure in the joint names of the lessor and lessee. The appellant has undoubtedly broken this, and the lessor has undoubtedly lost the control over the money paid by the insurance company which he would have had had the covenant been performed. But if the money which has been received be properly applied to the reinstatement of the premises, he would not suffer any pecuniary loss by the breach of covenant. And as to control, Mr. Leslie Scott stated that his client was quite willing to be declared a trustee of this money for himself and the lessor. Owing to the controversy which has arisen as to what took place at the trial, it is evidently a matter for arrangement between the parties, but if no arrangement be arrived at, I think the appellant is liable for this breach of contract.

For the foregoing reasons I am clearly of opinion that this appeal fails, and should be dismissed with costs.

LORD SUMNER. My Lords, I have enjoyed the great advantage of considering the opinion which has been prepared and just delivered by my noble and learned friend on the woolsack, and beyond acknowledging my indebtedness to him I have only to say that I agree in the motion which he has proposed.

LORD BUCKMASTER. My Lords, my noble and learned friend, Lord Wrenbury, desires me to say that he has read the opinion I have delivered and agrees with it.

LORD CARSON. My Lords, I concur that this appeal fails. I think it is greatly to be regretted that two subjects equally innocent of any wrongful act should have been driven to undertake this expensive litigation by events arising out

H. L. (E.) 1922 MATTHEY v. CURLING.

of the action of the military authorities over which the litigants had no control, and for which they were in no sense responsible.

Judgment of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 21, 1922.

Solicitor for the appellant : *C. E. W. Ogilvie.*
Solicitors for the respondent : *Corbould, Rigby & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *March* 30.

COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM . . } APPELLANTS ;

AND

OWNERS OF THE STEAMSHIP VALERIA RESPONDENTS.

Shipping—Collision—Chartered Vessel—Measure of Damages.

In 1917 a ship, which had been chartered by the Admiralty, was damaged owing to a collision with another ship, the latter being solely to blame, and was detained for a week for repairs. At the time of the collision the chartered ship was used as an ordinary trading vessel for freight. In assessing the damage caused by the detention of the ship for repairs :—

Held, that the measure of damages was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses, and was not the sum of the actual out-of-pocket expenses, including the cost of the hire of the ship, to which the Admiralty were put during that period.

The Argentino (1889) 14 App. Cas. 519 ; 13 P. D. 191 applied.

The Greta Holme [1897] A. C. 596, *The Mediana* [1900] A. C. 113 and *The Marpessa* [1907] A. C. 241 distinguished on the ground that the ships in question in those cases were not freight-earning vessels.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J., which affirmed an award of an arbitrator made in the form of a special case.

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, and LORD CARSON.

The claim in the arbitration arose out of a collision which occurred in Lamlash Harbour on September 20, 1917, between the Dutch steamship *Rijsbergen* and the respondents' steamship *Valeria*.

The *Rijsbergen* was at the time of the collision on hire to the Admiralty (the appellants), and by an agreement dated June 24, 1918, made between the appellants and the respondents, the question of liability for the collision and the assessment of the damages caused thereby was referred to Mr. Butler Aspinall K.C. as arbitrator.

The arbitrator, having pronounced that the *Valeria* was alone to blame for the collision, proceeded to consider the appellants' claim for damages. All the items in the claim were eventually agreed except the claim in respect of the cost of the ship and her crew to the appellants whilst she was under repair, and it was further agreed that the period of detention was seven days.

The appellants had chartered the ship in 1917 by arrangement with the Dutch Government and had placed the management of the ship in the hands of Furness, Withy & Co., who employed the ship as an ordinary trading vessel to carry cargoes for which freight was paid. The appellants paid to the Dutch Government hire at the rate of 35*s.* per deadweight ton per month, and in addition paid all working expenses, such as wages, victualling, etc. Furness, Withy & Co. had employed the vessel in such a way that, without taking into account the amount of hire payable to the Dutch Government, she earned an average daily profit of approximately 143*l.*, for which sum Furness, Withy & Co. accounted to the appellants.

It was contended on behalf of the appellants that they were entitled to recover from the respondents as damages for the loss of the use of the vessel the sum paid to the Dutch Government for the hire of the vessel in addition to the daily cost of working the vessel.

It was contended on behalf of the respondents that the amount of hire paid to the Dutch Government was an

H. L. (E.) 1922 ADMIRALTY COMMISSIONERS v. S.S. VALERIA.

irrelevant consideration and that the appellants were only entitled to loss of profits plus working expenses.

Subject to the opinion of the Court, the arbitrator found in favour of the appellants' contention, and he assessed the damages at 2562*l.*, being the cost of hire, wages, victualling stores and management at 366*l.* per day. Rowlatt J. affirmed the award.

The Court of Appeal (Bankes, Scrutton, and Atkin L.JJ.) reversed the decision of Rowlatt J., and by consent of the parties assessed the damages at 1168*l.* 15*s.* 4*d.* on the basis of the respondents' contention.

Dunlop K.C. (*Sir Ernest Pollock A.-G.* with him) for the appellants. The result of the delay brought about by the collision is that the cost of the voyage was increased by the cost of the ship to the appellants during the week she was delayed. In consequence of the collision the cost of the ship and crew during that week has been thrown away. That cost consisted of the reasonable cost of the hire of the ship and the reasonable cost of the hire of the crew. The latter item is admittedly recoverable and there is no difference in principle between the two items.

As the appellants have been wrongfully deprived of their right to use the ship in any manner they pleased for a week they are at least entitled to be reimbursed by the wrongdoer such expenses as they fairly and reasonably incurred in connection with the ship during that week. The hire payable by the appellants as time charterers was reasonable and fairly represented the net profit which the ship was capable of earning at the time of the collision. The value of the ship's services ot the nation was equivalent at least to her fair and reasonable cost to the appellants, who hired and used her for the benefit of the nation. In *The Greta Holme* (1), where a steam dredger was injured owing to a collision, Lord Herschell said : " If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted

(1) [1897] A. C. 596, 605.

that the sums so paid could have been recovered." This dictum was quoted and followed by Collins L.J. in *The Mediana* (1) and was approved in the same case in the House of Lords by Lord Halsbury, who expresses the same opinion in different language. Scrutton L.J. suggests that Lord Halsbury must have forgotten the decision of this House in *The Argentino* (2), but Lord Halsbury, after expressing his approval of *The Greta Holme* (3), next proceeded to discuss *The City of Peking* (4), which was saturated with *The Argentino*. (2) This shows that he did not forget that decision, and he was not purporting to disagree with it in any way. *The Marpessa* (5) proceeds on the same lines.

Raeburn K.C. and *Hugh Dumas* for the respondents were not called on.

LORD BUCKMASTER. My Lords, the question that arises for determination upon this appeal is simple and interesting. In 1917 the British Government hired from the Dutch Government a steamer known as the *Rijsbergen*, the rate of hire being 342*l.* a day. In September of 1917 she was damaged by collision with the *Valeria*, and it has been found that for that collision the *Valeria* was solely to blame. The damage was capable of repair, the vessel was in fact repaired and the voyage completed, but owing to her injuries she was detained from September 20, 1917, to September 29, 1917, and in the claim for the damage due to the collision the Admiralty put forward a sum in respect of her disability during that period of time. This sum was fixed in the following way. They took the hire per day of the vessel as they had agreed it from the Dutch Government and added certain items for wages, thus bringing the total to 366*l.*, which, multiplied by seven representing the period of time between the two dates which were not inclusive, produced a total of 2562*l.* The claim came before

(1) [1899] P. 127, 138; [1900] A. C. 113, 117.

(2) 14 App. Cas. 519; affirming the C. A. (1888) 13 P. D. 191.

(3) [1897] A. C. 596, 605.

(4) (1890) 15 App. Cas. 438.

(5) [1906] P. 14, 95; [1907] A. C. 241.

H. L. (E.) 1922 ADMIRALTY COMMISSIONERS v. S.S. VALERIA. Lord Buckmaster.

Mr. Aspinall as an arbitrator, and he held that the Admiralty were entitled to recover the full amount. Rowlatt J., before whom the award came on appeal, supported this view, but the Court of Appeal have unanimously differed from his judgment, and from the Court of Appeal the matter has been brought before your Lordships' House.

The appellants' contention is that as the sum they claim was the actual out-of-pocket expense to which they were put during the period of time when the vessel was incapacitated, and they could not obtain anything from its use, that sum is the clear measure of their loss, and in support of this view they have referred to a series of cases such as the *Greta Holme* (1), the *Mediana* (2) and the *Marpessa*. (3) My Lords, I think it will be found upon examination that these cases do not support the contention. It was laid down as long ago as 1889 in the case of the *Argentino* (4) that in assessing damages due to a collision a ship is to be considered merely as a thing by the use of which money may be ordinarily earned; and the only question is, to use the words of Bowen L.J. in the Court of Appeal, "what is the use which the shipowner would, but for the accident, have had of his ship, and what . . . . the shipowner, but for the accident, would have earned by the use of her." The other cases which have been referred to by Mr. Dunlop are each and all of them cases in which the subject matter of the suit was a vessel which, in the ordinary course, would have earned nothing at all, as for example a dredger or a lightship; and it should be specially remembered that until the decision in the *Greta Holme* (1) it had always been held that nothing but nominal damages were recoverable for the injury to such a craft upon the ground that there was no other use to which she could be put, and that there was no actual out-of-pocket expense during the period when she was incapacitated. The *Greta Holme* (1) altered those views and established that the loss of the use of the vessel was a

(1) [1897] A. C. 596.
(2) [1900] A. C. 113.
(3) [1907] A. C. 241.
(4) 14 App. Cas. 519; 13 P. D. 191, 201.

thing which was capable of being measured, even although it was incapable of being let for hire in the ordinary way.

In the present case the facts which have been found are these: that this vessel had in fact made two voyages and that during those voyages she had earned a profit freight over and above expenses in the one case of 151*l.* a day and in the other 134*l.* It is important to remember that the finding is that those freights represented a profit balance, and, of course, in determining that profit the actual amount of hire that was being paid for the charter was not included. It was the average of the sum of those two items, together with the ship's expenses, that the Court of Appeal allowed as the damage in the present case. Although at first Mr. Dunlop challenged the principle that the amount of what was to be earned could ever be made the true measure of the damage, in substance his objection to that figure was this, that the learned arbitrator had found that the amount that was being paid by the British Government under the agreement by which the vessel was taken over was, in fact, a fair sum, and that it necessarily followed that the amount of value, tested by the freights which had been earned on the two voyages, must have been assessed by making a depreciation of the amount due to the fact that this country was at war and that ordinary marketable conditions would not have been regulating the trade.

In the first place the answer to this is that no such finding was ever given by the learned arbitrator, and in the next it has been pointed out quite fairly by Mr. Dunlop that if this matter went back to the arbitrator for reconsideration he would be unable to show more than the fact that if the vessel was once more let on a time charter it would be possible to let her at a larger sum. The comparison of the hire on a time charter does not appear to me to be a fair means of considering this question. What has to be considered is what would this vessel have earned for the period of the seven days that she was incapacitated owing to the accident; and that amount is the true measure of the damage which the vessel who was to blame is called upon to pay, and it

H. L. (E.) 1922

ADMIRALTY COMMISSIONERS v. S.S. VALERIA.

Lord Buckmaster.

can only be ascertained by considering what she had earned under similar conditions.

I desire particularly to emphasise that in each of the judgments of the learned Lords Justices in the Court of Appeal this case has been based upon an assumption that the matter dealt with was an ordinary commercial venture, and that the standard of damages applicable was the standard proper in such a case. Having regard to the statement I have made I think that assumption was correct, and upon that assumption the conclusion which the learned judges in the Court of Appeal drew is to my mind one that cannot be controverted. For this reason, my Lords, I am of opinion that this appeal should fail.

LORD DUNEDIN. My Lords, I concur. I agree with the Lords Justices in the Court of Appeal, but I cannot refrain from a slight criticism upon the use of the phrase "Restitutio in integrum." "Restitutio in integrum" is a phrase which is properly applied when you wish to express the condition which is imposed upon a person seeking to rescind a contract. I do not think it can be properly applied to questions of tort; and the illustration I give is a very simple one. If by somebody's fault I lose my leg and am paid damages, can any one in his senses say I have had restitutio in integrum? The true method of expression I think is that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him. Now the loss which was suffered in this case was a loss of freight. I put the case in the course of the argument: Supposing a man had a house at a certain rent and sub-let it at a smaller rent, if that were taken from him he would not get more, I take it, than the smaller rent which he had received; but if he had shown that he had let it to some member of his family at a fanciful rent, then there would have been inquiry as to what rent he could have got in the open market. In this case the whole question has been decided upon the assumption that the freight here was a

commercial freight. If that had got to be displaced I think it fell upon the appellants to displace it; they have not done so, and as Mr. Dunlop has very candidly said, even if they got a remit to the arbitrator they would not be able to do it.

LORD ATKINSON. My Lords, I concur. I think the decision of the Court of Appeal was right on the assumption that this was a commercial freight. I think that is an assumption you must adopt, inasmuch as, if it is said to be owing to a different fact, the burden of proving that lay upon the appellants, and they have not proved it.

LORD CARSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 30, 1922.

Solicitor for the appellants: *Treasury Solicitor.*

Solicitors for the respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)* 1922 April 4.

ATLANTIC SHIPPING AND TRADING COMPANY, LIMITED . . . . . } Appellants;

AND

LOUIS DREYFUS AND COMPANY . . Respondents.

Shipping—Charterparty—Arbitration Clause—Term of Clause restricting the Right to sue—Ouster of the Jurisdiction of the Court—Action in Respect of Damage caused by Unseaworthiness—Implied Condition of Seaworthiness—Action whether barred by Arbitration Clause.

A ship was chartered for a voyage from Rosario to Hull with a full cargo of linseed. The charterparty provided for the reference of all disputes under the contract to the final arbitrament of two arbitrators, one to be appointed by each of the parties, with power to appoint an umpire, and the clause continued: "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred."

After the arrival of the ship at Hull the charterers brought an action against the shipowners in respect of damage alleged to have been occasioned to a part of the linseed during the voyage by reason of the unseaworthiness of the ship at the commencement of the voyage. The shipowners pleaded that the charterers failed to appoint their arbitrator within three months of the discharge of the ship and that by reason thereof the action was not maintainable, and, by order of the Court, the question whether the claim in the action was barred by the arbitration clause was tried as a preliminary question of law:—

Held, (1.) that the arbitration clause was not open to objection on the ground that it ousted the jurisdiction of the Court; but (2.) that, inasmuch as the claim in the action was founded upon a breach of the implied condition of seaworthiness, there being in the charterparty no express provision relating to unseaworthiness, the shipowners were not entitled to the benefit of the term in the clause restricting the time within which the action could be brought, and that consequently the claim was not barred by the arbitration clause.

Tattersall v. *National Steamship Co.* (1884) 12 Q. B. D. 297 applied.

Bank of Australasia v. *Clan Line Steamers* [1916] 1 K. B. 39 distinguished.

Decision of the Court of Appeal affirmed on different grounds.

Appeal from an order of the Court of Appeal reversing an order of Rowlatt J.

* *Present:* Lord Buckmaster, Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Carson.

The appellants were the owners and the respondents were the charterers of the steamship *Quantock*.

By a charterparty dated May 2, 1919, and made between the parties it was agreed that the steamship should proceed to Rosario and there load a complete and full cargo of linseed for carriage to Hull. The charterparty was in the printed form of the Chamber of Shipping River Plate Charterparty, 1914. Clause 39 provided as follows: "All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred."

The *Quantock* duly received the cargo at Rosario and arrived at Hull early in September, 1919.

Shortly after her arrival the respondents gave notice in writing to the appellants that they intended to put in a claim in respect of damage occasioned to some of the linseed carried on board the steamship in the course of the voyage and they withheld payment of part of the freight.

On September 27 the appellants' solicitors wrote to the respondents' solicitors as follows: "S.S. *Quantock*. In consideration of your clients Messrs. Louis Dreyfus & Co. paying the full freight and also any demurrage which may be found to be legally due from them to the shipowners, we, on behalf of the above steamer, are prepared to give an undertaking to pay for any damage to cargo which may be found to be legally due from the steamer to your clients."

The cargo was finally discharged from the *Quantock* on September 29 and on October 31 the respondents paid to the appellants the balance of freight due in respect of the carriage of the goods.

The respondents neither claimed arbitration nor appointed

H. L. (E.) 1922 ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & CO.

an arbitrator within three months of final discharge or at any time.

On May 3, 1920, the respondents commenced an action in the King's Bench Division against the appellants in respect of the alleged damage to the cargo. By their points of claim the respondents alleged that the appellants in breach of their duty to carry and deliver the linseed in good condition had delivered part of it in bad condition and they claimed 2233*l.* 4*s.* 6*d.* damages. The appellants by their defence alleged (inter alia) as follows: "5. The said claim in this action arose out of the said charterparty and the plaintiffs failed to appoint their arbitrator within three months of the final discharge of the said ship. The defendants will contend that by reason thereof the plaintiffs must be deemed to have waived their claim and that no action can now be brought in respect thereof."

By their reply the respondents alleged (1.) that by the agreement contained in the letter of September 27, 1919, the appellants waived their rights under the arbitration clause, and (2.) that at the date when the goods were loaded and at the date of the commencement of the voyage with the goods on board the *Quantock* was unseaworthy and unfit to receive the goods on board and that the damage to the goods was caused by the said unseaworthiness and unfitness of the steamer.

Upon the application of the respondents the Court ordered that the question of law whether the claim in the action was barred by the arbitration clause be tried as a preliminary question.

Upon the trial of this question Rowlatt J. held (1.) that the mode of procedure set out in the arbitration clause—namely, that a claim must be made in writing and the claimants' arbitrator appointed within three months of final discharge—was a condition precedent to the bringing of any action at all; (2.) that the arbitration clause applied even though the vessel was unseaworthy at the commencement of her voyage, as the unseaworthiness of the vessel had nothing to do with the application of the arbitration clause, which dealt

with a question of procedure; (3.) that the letter of September 27, 1919, did not affect the legal position of the parties.

The Court of Appeal (Bankes, Warrington and Atkin L.JJ.), while agreeing with the learned judge as to the construction of the arbitration clause, reversed his decision on the ground that the clause was against public policy, as the effect of it was to oust the jurisdiction of the Court.

1922. March 7, 9. *Dunlop K.C.* and *Jowitt* (1) for the appellants. The arbitration clause in the charterparty, as Rowlatt J. held, affords a complete answer to the respondents' claim. The Court of Appeal in holding the clause bad on the ground that it ousted the jurisdiction of the Court misappreciated the point to be tried as a preliminary question. The respondents cannot maintain the action, because at the date of the writ they had no cause of action. The arbitration clause imposes the condition that the claimants' arbitrator must be appointed within three months of final discharge as a condition precedent to the bringing of an action, but there is no ouster of the jurisdiction of the Court. If the charterers had made a claim in writing and had appointed an arbitrator within the stipulated time they could have brought an action, and, subject to a stay being granted, the Court would have had complete jurisdiction. Parties are at liberty to impose any conditions they please in regard to the constitution of their contractual obligations. The appellants are submitting to the jurisdiction of the Court, but are maintaining that the respondents have no cause of action, and that is a perfectly legitimate attitude to take up: *Scott* v. *Avery*. (2) The authorities establish that there is no objection on the plea that the jurisdiction of the Courts is ousted to the ordinary clause agreeing to refer disputes to arbitration: *Doleman & Sons* v. *Ossett Corporation* (3); *Hamlyn & Co.* v. *Talisker Distillery* (4); or to an agreement by which the award of an arbitrator is made a condition

(1) Mr. Jowitt was appointed K.C. on March 14, 1922.
(2) (1856) 5 H. L. C. 811.
(3) [1912] 3 K. B. 257, 267.
(4) [1894] A. C. 202; 21 R. (H. L.) 21.

H. L. (E.) 1922 ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & CO.

precedent to the right to sue : *Scott* v. *Avery* (1) ; *Caledonian Insurance Co.* v. *Gilmour* (2) ; *Spurrier* v. *La Cloche* (3) ; *Jureidini* v. *National British and Irish Millers Insurance Co.* (4) ; or to an agreement that no claim shall be recoverable unless made within a certain time : *Moore* v. *Harris* (5) ; *Pompe* v. *Fuchs.* (6) The last cited case is closely analogous to the present.

[They also referred to *Ford* v. *Beech.* (7)]

Neilson K.C. and *Clement Davies* for the respondents. 1. This clause is void as ousting the jurisdiction of the Courts. On this question there is no real difference between the parties as to the principle to be applied ; the only difference is as to the application of the principle. In the respondents' submission the words mean " We contract not to go to the Court under any circumstances," and the Court of Appeal have so held : *Horton* v. *Sayer.* (8) 2. This vessel was, or for the purposes of the preliminary point must be deemed to be, unseaworthy at the commencement of the voyage, and the loss complained of is due to that unseaworthiness, with the result that the appellants are not entitled to claim the benefit of any of the special clauses in the charterparty. Where goods are shipped on board ship there is an implied condition of seaworthiness, which forms the basis of the contract, and where there is a breach of that condition and the loss arises from that breach the shipowner cannot rely upon the special conditions of the contract. Where the charterparty contains express conditions as to seaworthiness those express conditions are taken to override the implied condition, but here there are no such express conditions. The contention of the respondents is not that the arbitration clause is wholly inoperative, but only that the subsequent words, which might exist without the arbitration clause, do not apply. The time limit stipulation is inserted for the protection of the shipowner, but he can only avail himself of that protection

(1) 5 H. L. C. 811.
(2) [1893] A. C. 85.
(3) [1902] A. C. 446.
(4) [1915] A. C. 499, 505.
(5) (1876) 1 App. Cas. 318.
(6) (1876) 34 L. T. 800.
(7) (1848) 11 Q. B. 852.
(8) (1859) 4 H. & N. 643.

when he is sued upon something which is in the contract itself. The obligation of seaworthiness is something dehors the contract: *Kish* v. *Taylor* (1); *The Europa* (2); *Tattersall* v. *National Steamship Co.* (3); *Bank of Australasia* v. *Clan Line Steamers.* (4) 3. The appellants by their own conduct, as evidenced by the letter of September 27, have waived their reliance on the arbitration clause.

Jowitt in reply. The arbitration clause is a mutual clause for the benefit of both parties. Therefore it cannot be said that this clause must go, unless it is contended that the whole charterparty must go. This is a procedure clause. The last half is a corollary of the first half and the clause applies in toto. The point sought to be made by the respondents goes far beyond the decisions, which apply only to the exceptions clause—a clause inserted for the benefit of the shipowner: *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (5); *The Europa* (6); *Kish* v. *Taylor.* (7) The letter of September 27 does not affect the legal position of the parties.

The House took time for consideration.

1922. April 4. LORD BUCKMASTER. My Lords, I have had the opportunity in this case of seeing the opinion that has been prepared by my noble and learned friend Lord Sumner. I agree entirely with its contents and I have nothing to add.

LORD DUNEDIN. My Lords, under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad, as an ousting of the jurisdiction of the Courts, but that position was finally abandoned in *Scott* v. *Avery.* (8) As I read that case, it can no longer be said that the jurisdiction of the Court is ousted by such an agreement; on the contrary, the jurisdiction of the Court

(1) [1912] A. C. 604.
(2) [1908] P. 84.
(3) 12 Q. B. D. 297.
(4) [1916] 1 K. B. 39.
(5) [1907] 1 K. B. 660.
(6) [1908] P. 84, 93.
(7) [1912] A. C. 604, 615-6.
(8) 5 H. L. C. 811.

H. L. (E.) 1922 ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & CO. Lord Dunedin.

is invoked to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration started within a certain time the claim is to be held to be abandoned. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, e.g., every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law? All it comes to is this: I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration within a certain time or you shall be held to have waived your claim. For these reasons, I do not think the judgment of the Court of Appeal can be supported.

We have, however, had another argument which does not really arise on the preliminary question as put, but which, as it has been dealt with in the Courts below, should be disposed of here. The respondents aver that the vessel when starting on the voyage was unseaworthy, and that the damage for which they sue was caused by such unseaworthiness, and they say that if they prove these two facts then the clause in question affords no protection. On this point we have no indication as to what the opinion of the learned judges of the Court of Appeal would have been. Rowlatt J. rejected the contention on the ground that the implied condition of seaworthiness had nothing to do with and was not in any way affected by a condition which was one of procedure only. There was, however, quoted to us a judgment of Bailhache J. in the case of the *Bank of Australasia* v. *Clan Line Steamers* (1) to the opposite effect. In that case there was a clause that no claim could be available which was not made at the port of delivery within seven days of the steamer's arrival there,

(1) [1916] 1 K. B. 39.

and Bailhache J. held that that clause was no bar to an action raised upon the averment that the ship was unseaworthy and that the damage which was sued for was caused by such seaworthiness. His judgment was reversed by the Court of Appeal, but on the ground, which had not been noticed by Bailhache J., that there was in the charterparty an express exception of damage caused by unseaworthiness and that that being so the express clause must be read along with all other express clauses, of which the limitation of liability was one. It is pointed out by the respondents that in this case there is no express clause as to unseaworthiness, which is therefore left to be dealt with on the implied condition.

My Lords, in these commercial cases it is, I think, of the highest importance that authority should not be disturbed, and if your Lordships find that a certain doctrine has been laid down in former cases and presumably acted on in the framing of other contracts you will not be disposed to alter that doctrine unless you think it is clearly wrong.

Before the decision of Bailhache J. there was the earlier case of *Tattersall* v. *National Steamship Co.* (1), a judgment of Day and A. L. Smith JJ., where it was held that, there being no express contract as to unseaworthiness, a clause limiting liability to 5*l.* per animal (the goods shipped were cattle) did not apply to damage done by unseaworthiness. I think it is clear that the learned judges of the Court of Appeal in the *Bank of Australasia Case* (2) approved of that case in terms, and therefore inferentially, though they do not actually say so, approved of Bailhache J.'s judgment if there had not been an express clause dealing with unseaworthiness.

Now, does the present case fall into line with *Tattersall's Case* ? (1) On the best consideration I can give to the matter, I think it does. It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment in toto. Such a doctrine would lead to absurd consequences ; the goods might be safely delivered and yet no freight due under the contract, but only a quantum meruit for services rendered. The test seems to me to be whether the particular clause

(1) 12 Q. B. D. 297. (2) [1916] 1 K. B. 39.

H. L. (E.) 1922

ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & CO.

Lord Dunedin.

interferes with the liability which unseaworthiness creates. It is just here that I think Rowlatt J. did not sufficiently distinguish between the two parts of the clause. So far as it dealt with the procedure, I agree with him, and if this clause had been a mere reference to arbitration and had stopped there, I do not think it would have been hit. But it goes on and, under certain conditions, destroys liability. If *Tattersall's Case* (1) is right that you cannot in such cases appeal to a limitation of liability, surely it is a fortiori to say you cannot appeal to its destruction.

I think there is nothing in the waiver point. For these reasons I agree with the motion to be made by my noble and learned friend on the woolsack.

LORD ATKINSON. My Lords, I too have had the pleasure and advantage of reading the judgment about to be delivered by my noble and learned friend Lord Sumner and I concur in it.

LORD SUMNER. My Lords, this case turns upon clause 39 of the charter. The first question is, whether it means that, if the charterer does not make a claim or name an arbitrator within three months of the final discharge, he agrees that he is not in any way or in any circumstances to have any access to His Majesty's Courts for the purpose of raising his claim. The Court of Appeal thought that it does. With great respect, I am unable to agree. The clause does not mean that under no circumstances shall a claimant be allowed to enter His Majesty's Courts at all, but that the cause of action shall not be complete, and therefore cannot be made the subject of proceedings, unless the specified conditions have first been satisfied. The point, however, hardly admits of discussion; a view is formed of it, one way or the other, simply on the perusal of the words, for the question is purely one of interpretation. I think the words do not exclude the cargo owner from such recourse to the Courts as is always open by virtue of the provisions of the Arbitration Act to a

(1) 12 Q. B. D. 297.

party who has agreed to arbitrate. If so, as of course the Court of Appeal would have been the first to recognize, the jurisdiction of the Courts is not ousted, so as to make this arbitration clause bad altogether. Its terms can be enforced.

The second point is whether a term, that a claim is to be absolutely time-barred after three months, if certain conditions have not previously been satisfied, is available for a shipowner, where the claim is for damage to cargo arising because the ship was not reasonably fit to carry the goods, there being in the charter no express exception of unseaworthiness. Of course the clause means that the ship is liable for proved unseaworthiness under certain circumstances—namely, if the claim and the nomination are made in time—but not otherwise. Can it be said that this recognition of liability sub modo prevents the clause from operating as an exception at all, and reduces it to a mere "procedural" provision, fixing the conditions under which liability will be established? My Lords, with great respect to the opinion of Rowlatt J., I do not think that it can. The point of course is not dealt with in the judgments of the Lords Justices.

The question arose in this way. To save the great expense of going to trial upon an issue of fact, whether the cargo was damaged in consequence of the ship's unseaworthiness or not, which might prove after all to be capable of a short answer under the charter, by reason of the charterers' non-compliance with the conditions of clause 39, it was agreed between counsel that the construction of the charter should be decided as a preliminary question, as if upon demurrer, it being assumed against the shipowner that the damage to the cargo arose in consequence of the ship's unseaworthiness, and against the charterers, that they were out of time in making their claim. It is a pity that the agreement was not embodied in an order, specifying the preliminary question and directing it to be tried. This ought to have been done, and, but for the fact that there is no reasonable doubt about either the agreement or the terms of it, your Lordships would, I apprehend, have declined, as well you might, to entertain the question.

H. L. (E.) 1922 ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & CO. Lord Sumner.

By the charter the shipowner undertakes to load and carry the cargo and to deliver it at the destination for a freight payable (except as to advances) on right and true delivery. The undertaking is, of course, subject to numerous exceptions of a usual character. Unseaworthiness itself is nowhere mentioned, nor is liability for the consequences of it excepted under any other term. The fact that the words in clause 39 which are relied on—namely, "any claim must be made in writing and claimants' arbitrator appointed within three months"—are in quite general terms, does not avail, for such mere generality has long been held, in connection with specific excepted perils, not to be inconsistent with liability for the particular cause of loss—namely, unseaworthiness.

The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.

This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit pro tanto the shipowners' liability. There is no difference in principle between words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay. In *Tattersall* v. *National Steamship Co.* (1) the words "under no circumstances shall they be held liable for more than 5*l.* for each of the animals" were held inapplicable to protect the shipowners from liability for the full value of animals lost by the ship's unseaworthiness, in spite of the apparently unrestricted generality of the words "under no circumstances," and in spite of the fact that they

(1) 12 Q. B. D. 297.

recognized liability up to 5*l.* a head, and did not purport to exclude it altogether. That such words do not avail, where loss is due to unseaworthiness, was virtually recognized in *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (1) and held in *Wiener & Co.* v. *Wilsons, &c., Line.* (2) Bailhache J. expressly so held in *Bank of Australasia* v. *Clan Line Steamers* (3), and the Court of Appeal in reversing his decision recognized that it would have been correct but for a circumstance which he had overlooked—namely, that unseaworthiness was the subject of an express provision and therefore the underlying or implied provision with regard to it was ousted.

My Lords, in principle I think that clause 39, in so far as the parties, as it was said, provided their own statute of limitations, is unavailable to the shipowners as an answer to a claim for damage caused by unseaworthiness. It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable, or that the clause, being a mutual clause, might apply to protect the charterer in certain events, for example, against a claim for demurrage. The effect is not that the clause is deleted from the charter altogether. The shipowners gain no advantage against the charterer from their neglect to make the ship seaworthy; they merely cannot pray the clause in aid in that case. Nor are the words in question inapplicable because they occur in a mutual arbitration clause and are partly procedural. Even if they are read as meaning "I will be liable for three months and no longer and then only in an arbitration"—they still remain words, which except out of the shipowners' general liability certain losses—namely, losses the assertion of which is belated.

There is the further contention that a clause relieving a shipowner from damage to cargo caused by breach of the condition as to seaworthiness, to be effectual must be clear. Now to say that a claim is to be waived is incorrect. If a right has accrued, it must be released or discharged by deed

(1) [1908] 2 K. B. 626, 632. (2) (1910) 15 Com. Cas. 294.
(3) [1916] 1 K. B. 39, 40.

H. L. (E.) 1922

ATLANTIC SHIPPING AND TRADING CO. v. LOUIS DREYFUS & Co.

Lord Sumner.

or upon consideration. Waiver applies to an election as to something in futuro; it is not a term by which to describe the answer to a right, which is complete in præsenti. It seems to me, however, that the words, shall be "deemed to be absolutely barred" are not obscure. Their meaning is plain; the only doubt is whether they are effective. Accordingly I should not for myself regard these words as falling within the rule in *Elderslie Steamship Co.* v. *Borthwick.* (1)

For these reasons I think the appeal fails. There is nothing in the point about the solicitors' letter.

LORD BUCKMASTER. My Lords, the noble Lord, Lord Carson, desires me to say that he agrees with the opinion that has been expressed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 4, 1922.

Solicitors for the appellants: *Holman, Fenwick & Willan.*

Solicitors for the respondents: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

(1) [1905] A. C. 93.

[HOUSE OF LORDS.]

LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

NEILSON . . . . . RESPONDENT.

H. L. (E.)*
1922
May 12.

Carrier—Goods—Railway Company—Owner's Risk Contract—Departure from agreed Transit—"Misconveyance"—Liability of Railway Company.

Luggage and theatrical properties were delivered by the plaintiff to the defendant railway company for carriage from L. to B. via M. on the terms of an owner's risk consignment note, by which the defendants were to be relieved from liability for "loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during any portion of the transit . . . . except upon proof that such loss, etc., arose from the wilful misconduct of the company's servants." The goods were put into a van reserved for the plaintiff and labelled through to B., but the labels had become detached before the arrival of the van at M. The packages in the van bore either no labels or old labels to various stations in different parts of the country. At M., owing to a mistake of the defendants' servants, the van was unloaded and the goods bearing no labels were put into the cloakroom and those which bore old labels were despatched to the various destinations thereby indicated, with the result that their delivery was delayed:—

Held, that when the goods were dispersed at M. the agreed transit was departed from and the protection afforded to the carrier during the transit ceased; and that there was no "misconveyance" of the goods within the meaning of the consignment note.

Mallet v. *Great Eastern Ry. Co.* [1899] 1 Q. B. 309 applied.

Foster v. *Great Western Ry. Co.* [1904] 2 K. B. 306 overruled.

Decision of the Court of Appeal [1922] 1 K. B. 192 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court (2), which reversed a judgment of the deputy judge of the Bloomsbury County Court in favour of the defendants in the action.

On June 27, 1922, the respondent, who was the proprietor of a theatrical company, entered into a contract with the appellants, the London and North Western Railway Company, for the conveyance by the appellants of the theatrical

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, and LORD SUMNER.

(1) [1922] 1 K. B. 192. (2) [1921] 3 K. B. 213.

H. L. (E.) 1922 L. & N. W. Ry. Co. v. Neilson.

properties and luggage of the company at owner's risk from Llandudno to Bolton via Manchester, the goods to be delivered at Bolton on the morning of June 28.

The action was brought by the respondent against the appellants in the county court to recover 28*l.* 4*s.* 3*d.* damages for a loss alleged to have been sustained by the respondent through the delay caused in the delivery of the goods by the appellants' breach of contract. The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of Lord Buckmaster, and they are summarised in the headnote.

The deputy county court judge was of opinion that the case was covered by *Foster* v. *Great Western Ry. Co.* (1) and gave judgment for the appellants. The Divisional Court (Lush and Greer JJ.), distinguishing *Foster* v. *Great Western Ry. Co.* (1), reversed the judgment of the deputy county court judge and ordered judgment to be entered for the respondent for the amount claimed.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) affirmed the order of the Divisional Court and overruled *Foster* v. *Great Western Ry. Co.* (1)

1922. April 6, 7. *Barrington-Ward K.C.* and *Tristram Beresford* for the appellants. The question is whether the acts complained of were done in attempted performance of the contract or were done in violation of the contract. The deputy county court judge has decided that the delay originated in a mistake made while the contract was being performed in the stipulated manner. That is a question of fact and the finding of the learned judge cannot be questioned. In *Mallet* v. *Great Eastern Ry. Co.* (2) it was held that where goods were to be sent by an agreed route the protection afforded to the railway company by the consignment note did not apply where the goods were sent by a substituted route. Here the initial cause of the loss was misconveyance on the agreed route. It makes no difference whether the act complained of is one of commission or of omission so

(1) [1904] 2 K. B. 306. (2) [1899] 1 Q. B. 309.

long as it occurs on the contract route and in attempted performance of the contract. The fact that the goods get off the route as a consequence of the initial act on the route is immaterial. Taking the goods out of the van and putting them in the cloakroom at Manchester was a misconveyance in the course of the route. It was not such a departure from the contract as to disentitle the appellants from relying on the terms of the consignment note : *Foster* v. *Great Western Ry. Co.* (1) That case has been constantly acted on and it governs this. The only difference between that case and the present is that in this case the act which caused the delay was the taking of the goods out of the van, whereas in *Foster's Case* it was the omission to take the goods out of the van. In *Gunyon* v. *South Eastern and Chatham Ry. Cos.' Managing Committee* (2) perishable goods contracted to be carried by passenger train were carried by goods train. The whole basis of the contract was that the goods should be carried by passenger train. Lawrence J. in pointing out the distinction between that case and *Foster's Case* treats the latter as good law. That case has no bearing on the present.

[They also referred to *Nicholson* v. *Willan* (3) ; *Garnett* v. *Willan* (4) ; *Morritt* v. *North Eastern Ry. Co.* (5)

Compston K.C. and *A. W. Elkin* for the respondent. When the company unloaded the goods at Manchester contrary to the intention of the parties they broke the contract and the transit came to an end. The company impliedly contracted to send the van to Bolton and this is borne out by the admission of the company that the van had been reserved for Bolton. No doubt if an accident occurred it might be the right and duty of the company to unload the van, but nothing of the kind occurred. The delay which caused the loss was not a delay during any portion of the transit and the goods when taken out of the van and dispersed were not being carried under the contract. *Foster* v. *Great Western Ry. Co.* (1)

(1) [1904] 2 K. B. 306.
(2) [1915] 2 K. B. 370.
(3) (1804) 5 East, 507.
(4) (1821) 5 B. & Al. 53.
(5) (1876) 1 Q. B. D. 302.

H. L. (E.) 1922

L. & N. W. Ry. Co. v. Neilson.

should be overruled on the grounds stated by the Court of Appeal.

Tristram Beresford replied.

The House took time for consideration.

1922. May 12. Lord Buckmaster. My Lords, the common law imposes upon the carriers of goods definite and well-known liabilities for the protection of owners. These liabilities are frequently modified by the terms of express contracts, but except to the extent to which plain language effects alteration they still remain and cannot be removed by subtle implications or ambiguous words. No doubt has found place in any of the judgments in this case as to the soundness of this principle and none exists. Its application has, however, an important bearing upon the controversy raised on this appeal.

The respondent is the proprietor of a theatrical company known as *My Soldier Boy* company, and in June, 1920, he was proposing to move the company from Llandudno to Bolton, in order to open at the latter place on Monday, June 28.

The appellants, the London and North Western Railway Company, by whose line the respondent proposed to travel, use a special form of contract applicable to the conveyance of theatrical companies and their scenery and luggage, and this was accepted by the respondent. It is headed as a "Combined form of application for tickets at reduced rate and consignment note for conveyance of scenery and luggage at owner's risk," and it continues by providing that the company will carry at special rates all the equipment of theatrical companies by passenger train at owner's risk when the baggage is accompanied by the owner. This makes plain that, if the form be used, the transit of the baggage for which the company is ready to contract is along the route of the passenger traffic between the points of departure and arrival, for it is only on the basis that the baggage is accompanied by the passengers that the contract applies. In the present

instance the contract was made on June 27, 1920, the tickets were issued at Llandudno, and the station for arrival of the goods was named as Bolton; the route for the passengers between these stations was therefore the agreed transit for the luggage. It appears, however, that the respondent was informed that the journey was via Chester and Manchester, and that the luggage would travel with the passengers as far as Manchester, but that it would probably arrive at Bolton at 6.21 on the Monday morning, June 28; to this extent, therefore, it was contemplated that the luggage and the passengers might part company. A special van was reserved for the scenery, and the journey proceeded without adventure as far as Manchester, which was reached at 7.38 P.M. on June 27. On arrival at that station it was found that the labels which had been duly affixed to the van had been accidentally detached, and there was no direction to enable the company's servants to ascertain its destination. A telegram was in fact despatched by the railway company to the inspector at Manchester that would have given the necessary information, but by an oversight it was not examined in time. The consequence was that, having no knowledge as to the disposal of the goods, the inspector did what he thought was the best thing in the circumstances. He dispersed the contents of the van. The pieces of luggage that bore no labels he placed in the cloakroom, and the rest he dispatched according to the addresses they bore. Many of these were old and misleading, and in the result some went to Bath, some to Scarborough, and those rightly labelled went to Bolton. They were all ultimately reclaimed and finally delivered at Bolton on Wednesday; but the missing goods, which included bagpipes and uniforms, prevented the matinée performance on Monday, and the respondent accordingly claimed 28*l.* 4*s.* 3*d.* damages against the railway company. About the amount of damage there is no dispute. The learned deputy county court judge dismissed the action, holding himself bound, as I think he might reasonably do, by the case of *Foster* v. *Great Western Ry. Co.* (1) On appeal

(1) [1904] 2 K. B. 306.

H. L. (E.) 1922

L. & N. W. Ry. Co. v. Neilson.

Lord Buckmaster.

to the Divisional Court this judgment was reversed, and the judgment of the Divisional Court was sustained in the Court of Appeal.

The real defence of the railway company rested on the following clause in the contract: "I also request you to carry the personal luggage, costumes, scenery, and other usual equipment belonging to or used by the company above mentioned, or by the members thereof, at the owner's risk, on the terms and conditions allowed to such companies shown below and on back hereof. In consideration of your doing so I agree, on my own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of *the transit* or whilst left in your possession to be stored whether the subject of a charge or otherwise) or of or to a trader's truck or sheet (if any) containing or covering them except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct of the Company's servants," and on the decision of *Foster* v. *Great Western Ry. Co.* (1) Apart from the meaning of the word "misconveyance," to which I will refer hereafter, I do not think that this defence can avail to relieve the company of liability. The exemption is from liability during "the transit," and when once the goods are diverted from that route the protection ends. This was made plain in the case of *Mallet* v. *Great Eastern Ry. Co.* (2), and even then it was not new law, but the application of a well-known principle to a particular case. There fish was consigned to the Great Eastern Railway for transit from Lowestoft to Jersey via Weymouth, Great Western Railway. They were sent via Southampton, with the result that there was departure from the contracted route, and the conditions were held inapplicable. In this part of this case the only difficulty is caused by the case of *Foster* v. *Great Western Ry. Co.* (1) In that case fish were consigned from Brixham to Jersey via Southampton.

(1) [1904] 2 K. B. 306. (2) [1899] 1 Q. B. 309.

They ought to have been transferred at Exeter, but by mistake were taken on to Taunton. The Lord Chief Justice regarded this as a "misdelivery," which was an excepted cause of damage, and Kennedy L.J. appears to have regarded it as an unintentional mistake. Neither reason appears to me adequate. I agree with Bankes L.J. that this was not misdelivery, which applies to the final act of handing over to the consignee, and I am unable to see how intention can affect the question. If the route be abandoned, whether it was due to oversight, ignorance, accident, or design, equally the agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease. I think *Foster* v. *Great Western Ry. Co.* (1) was wrongly decided, and it should be overruled. Mr. Beresford has skilfully argued that the delay had begun on the agreed route, and all that subsequently happened was only an aggravation of excepted damage. This would to my mind be a more cogent argument if confined to the goods placed in the cloakroom, but it is unnecessary to decide whether so restricted his contention is correct, for it appears that some of the uniforms went far astray, and without the proper uniforms the music of the bagpipes might cease to charm.

There remains the consideration of the word "misconveyance." I share, with Scrutton L.J., an inability to give this word a plain meaning, but as I regard conveyance as conveyance along the agreed route, misconveyance must equally mean a failure along that route, due, it may be, to accident or even to negligence if it were not wilful. Were the appellants' contention accepted it would amount, as counsel were compelled to concede, to reading the clause as one providing that the company should not be liable for loss or damage for any cause other than wilful negligence on the part of their servants. Apart from the reasons I have already given to show that the word does not apply, this contention is answered by the proposition I have already mentioned and I decline to give to confused phrases in such

(1) [1904] 2 K. B. 306.

H. L. (E.) 1922

L. & N. W. Ry. Co. v. Neilson.

a contract a meaning which an ordinary man would be slow to realize.

I think this appeal must fail and should be dismissed with costs.

Lord Dunedin. My Lords, the first necessity in this case is to see what are the facts.

Now, the first fact is that there was a contract to carry the theatrical properties from Llandudno to Bolton by an agreed route. That I deduce from the terms of the contract which specify the journey as from Llandudno to Bolton and say that the properties are to be accompanied by the passengers. The passenger route to Bolton was admittedly via Chester and Manchester. Had nothing more been said it would have been part of the contract that the goods should accompany the passengers for the whole of the transport, but this was so far altered by agreement between the manager and the railway officials, who explained to him that the van containing the goods would not go right through with the passengers, but would be detained at Manchester and then forwarded in the course of the next day, a proposal which was acquiesced in by the manager.

The next fact is that admittedly the van was not forwarded with the goods, but that through an error induced by the losing of the destination labels the van was emptied at Manchester and the contents dispersed, some packages which had old labels on them being despatched respectively to Bath and Scarborough, the unlabelled packages being deposited in the cloakroom as unclaimed luggage. When the goods did not arrive at Bolton and the mistake was discovered, the various missing articles were reclaimed from their respective whereabouts and were all finally delivered at Bolton, but delay had occurred which occasioned damage which is sued for, and as to the quantum of the damage there is now no dispute.

The defendant railway company assert protection under the clause in the policy which is as follows: "I agree, on my

own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during any portion of the transit or while left in your possession to be stored whether the subject of a charge or otherwise."

They say there was either delay or misconveyance. Delay there certainly was. I will deal with misconveyance subsequently. But then the delay must have occurred during the "transit." My Lords, I do not think it did. The agreed-on transit was from Llandudno to Bolton via Manchester—i.e., direct from Manchester to Bolton. It seems to me that when the goods were dispersed by the action of the officials clearing them out of the van at Manchester and then sending some to Scarborough and Bath and others to the cloakroom, the agreed-on transit to Bolton was by this action put an end to. The detention in the cloakroom might at first sight seem not so plainly to be an end of the transit, but when we see that the goods are put there not for the purpose of being put back in another van—as might have happened if, e.g., the first van had had a heated axle—but as unclaimed luggage, that is, I think, tantamount to saying that the transit of the goods had ended and that they were lying there for the owners to claim them. So far as delay is concerned, for these reasons I do not think the clause applies to what happened.

What, then, as to misconveyance? This is a coined word of no recognized significance. In order to serve the railway company's purpose and to escape the reasoning just used in the case of delay it must be given a meaning so wide as to override the idea of the agreed transit and to be equivalent to every form of mischance which prevents the goods which started from Llandudno from arriving at Bolton, as they ought to have done.

My Lords, I entirely agree with the view expressed by Scrutton L.J. and I venture to borrow his language: "If a carrier wishes to exempt himself from liability for the negligence of his servants he must do it in clear and

H. L. (E.) 1922

L. & N. W. Ry. Co. v. Neilson.

Lord Dunedin.

unambiguous language" and "he must use ordinary English and not inventive words of doubtful meaning."

I cannot therefore read the word "misconveyance" as carrying the wide meaning which it is necessary to give it in order to make it, in the circumstances, available to the railway company.

My Lords, I have rested my judgment so far on the words which limit the exceptions to such causes as arise during the transit, but I add that I think the same result would follow if these words had been omitted. Here again I borrow from Scrutton L.J., who says that it is a broad principle of great importance in all contracts of carriage that when a carrier protects himself by exceptions, unless they are very clearly worded, they only apply to his carrying out of the contract, and do not apply if he is doing something which he has not contracted to do. There is a familiar example of that rule in the cases which have held that an exception in a bill of lading is unavailing as against a loss due to causes falling within the words of the exception, but incurred in the course of a deviated voyage.

Holding, as I do, that the agreed transit was put an end to at Manchester, all that happened after was on an unagreed route.

I agree with the judgments of Day and Lawrence JJ. in the case of *Mallet*. (1) I do not agree with the judgment in *Foster*. (2) I do not think it is possible to distinguish that case upon the facts from *Mallet's Case*. (1) In both the agreed route had been so far followed, in the one case as far as London, in the other case as far as Exeter. What happened after that was that the goods were made to leave the agreed route, and the general principle enunciated by Scrutton L.J. seems to me to apply in both cases.

For these reasons I think the appeal should be dismissed.

Lord Atkinson. My Lords, the facts have already been fully stated and it is unnecessary to recapitulate them.

I, like Scrutton L.J., prefer to decide this case on two

(1) [1899] 1 Q. B. 309. (2) [1904] 2 K. B. 306.

broad principles, both well established: first, that when a special provision such as that relied upon in this case is introduced into a contract such as that into which the parties in this case have entered, it must be held, in the absence of language indicating the contrary, to refer to the subject matter of the contract and that alone—namely, the carriage of the goods from the point of departure to the destination named, by the route expressly or impliedly indicated. The special provision would admittedly have no application to a route wholly different, from start to finish, from the stipulated route. Neither can it, in my view, have any application to a deliberate diversion from the route indicated in the contract, after a portion of the authorized transit has been performed. I fail to appreciate the grounds upon which according to common sense and reason a distinction can be made between these two cases. As soon as the carrier deliberately deviates from the stipulated route he carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed that he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it—ceases to act in accordance with it, in fact violates it.

Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (1) clearly and forcibly states this principle, which is not confined to contracts of carriage by a railway company. He said: "The principle is well known, and perhaps *Lilley* v. *Doubleday* (2) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it." That statement of the general principle was approved of by

(1) [1921] 2 K. B. 426, 435. (2) (1881) 7 Q. B. D. 510.

H. L. (E.) 1922 L. & N. W. Ry. Co. v. Neilson. Lord Atkinson.

Atkin L.J. in the case of *The Cap Palos.* (1) The transit of the several labelled articles from Manchester to Bath, Scarborough and Newcastle, according to the name on the old labels which they respectively bore, was no part whatever of the transit contemplated by the contract of carriage. The diversion, though due to accident or mistake, was deliberate on the part of the company's servants. The delay in the performance by the company of the contract of carriage caused by these diversions is, in my view, not a delay to which the special provision of the contract applies. And the company are, therefore, as far as that goes, responsible for the loss sustained by the respondent resulting from this delay.

It was proved in evidence that the uniforms which were loaded in the van were absolutely necessary to be worn in the theatrical performance arranged for Monday. But these were among the articles dispersed in different directions and did not arrive at Bolton till the following Wednesday; so that the non-delivery of them in time for the performance of the matinée on Monday, the 28th, was in itself sufficient to cause the loss for which the damages have been awarded. It is unnecessary, therefore, to inquire whether the articles stored in the cloakroom were equally necessary with the uniforms to enable the matinée performance to take place on Monday. The evidence on the point is not as full and clear as would be desirable. None of the articles loaded on the van were "left in the company's possession to be stored." The company cannot, therefore, be protected under this clause of the special provision. Neither were they "misdelivered" within the meaning of that provision. Where the goods received by a carrier to be carried to a certain destination are retained by the carrier in his own possession and not delivered to any consignee or other person, it is a misuse of language to style that misdelivery. If this be so, as I think it is, then the only word in the special provision which could afford protection to the company is the word "misconveyance." I quite concur in the observations of Scrutton L.J.

(1) [1921] P. 458, 471.

as to the meaning, or want of meaning, of this word as applied to the matter in hand. If by its use it was designed to protect the company, though they should, through mistake or inadvertence, convey the goods, which they had contracted to carry by a certain route to a named destination, by another route and to another destination, the special provision would, then, in effect, amount to a stipulation that they should only be responsible for results caused by the wilful misconduct of their servants.

If this be the real object with which this ambiguous word has been introduced in the contract, the second broad principle, already referred to, applies with full force—namely, this: that where a carrier seeks to protect himself from liability for the negligence of his servants by exceptions of this far-reaching character he must do so in clear and unambiguous language, language which will convey to persons of ordinary understanding that he is reserving to himself a freedom from liability, save in the particular cases indicated, for anything that may happen to the goods entrusted to him to be carried to any named destination, whether the route be or be not indicated.

I concur with Bankes L.J. in the opinion he has expressed in reference to the passage he has quoted from the judgment of Greer J. I think that passage contains a clear, succinct and accurate statement of the principle applicable to such a case as this. The only authority which has been cited, or indeed which can be found, in conflict with it, is the case of *Foster* v. *Great Western Ry. Co.* (1) I thoroughly concur in the criticism of that case contained in the judgment of each of the Lords Justices in the present case. Lord Alverstone undoubtedly based his judgment on the ground that the taking of the fish past Exeter and on to Taunton instead of handing it over at Exeter to the South Western Company to be conveyed to Southampton was a misdelivery. The other learned judges who took part in the decision apparently adopted that view. I, like Scrutton L.J., cannot understand how the Great Western Company's allowing fish to remain

(1) [1904] 2 K. B. 306.

H. L. (E.) 1922 L. & N. W. Ry. Co. v. Neilson. Lord Atkinson.

in their truck at Exeter, thus keeping it in their possession, bringing it on to Taunton and not delivering it to anybody at Exeter, is a "misdelivery" of it.

I am clearly of opinion that the decision appealed from was right and should be upheld, and this appeal should be dismissed with costs.

Lord Sumner. My Lords, in order to obtain relief from liability for the damage, which the plaintiff admittedly sustained, the burden is on the appellant railway company to show that it was due to loss, misconveyance, delay or detention upon the transit from Llandudno to Bolton and during a portion of that transit. I think this correctly summarises the words relied on and correctly expands them with reference to the journey in question. If the appellants succeed in this, they succeed altogether, for liability for such damage arises only if wilful misconduct be proved by the plaintiffs, which they tried but failed to prove at the trial.

I think it is reasonably plain that the learned deputy county court judge found, and based his other findings on, the fact, that not only was the agreed route from Llandudno to Bolton to be the usual route—namely, through Chester and Manchester Exchange Station—but also that the goods were to be carried through in one van without unloading or breaking bulk. This alone will account for his finding that "the van was not forwarded to Bolton after being discharged," a fact otherwise immaterial. At any rate, the written contract is expressly designed for cases in which "such baggage is accompanied by the persons owning or using the same," and, as the appellants contended that, nevertheless, they were entitled to sever the baggage from its owners, it was for them to obtain a finding from the Court, showing to what extent and under what conditions this was to be done, and particularly whether discharge of the van at Manchester and removal of some of the packages to the cloakroom there, as unclaimed luggage, could be consistent with such modification. This they have failed to do.

I am willing to assume, as the hypothesis most favourable

to the appellants, although it is by no means clearly established in fact, that the properties, the lack of which caused the actual money loss sued for, were among those put into the cloakroom at Manchester, and not among those dispersed to Newcastle, Scarborough, and Bath. In my opinion, neither on the findings nor on the printed contract did the route from Llandudno to Bolton run through the Manchester Exchange Station cloakroom, nor was storage in a place where unclaimed luggage is deposited till it is claimed by some one, any portion of the transit between those two places. There was no delay till the goods were discharged from the van; no misconveyance, whatever that may mean, till they were conveyed from the van towards the cloakroom. A fortiori, delay and misconveyance to luggage en route for Bath or any other wrong destination did not occur during any portion of the agreed transit. Accordingly, I think the appeal fails.

My Lords, I agree with the Court of Appeal that *Mallet's Case* (1) and *Foster's Case* (2) cannot both stand and that the former is preferable. This is not, however, conclusive of the present appeal, for in those cases the reference to the transit qualified the carrying companies, to whose benefit the limitation on their liability was to enure, while here it qualifies the occurrence of the circumstances causing loss, in respect of which relief from liability may be claimed.

I will briefly deal with the appellants' arguments, as I understand them. However speedy and diligent the carriage from Manchester towards Bath or any of the other wrong destinations might be, every mile of it was a cause of delay to goods bound for Bolton. It cannot, therefore, be said that the delay or detention consisted entirely in the removal of the goods from the van at Manchester, and that thereafter no detention and delay occurred at all. Nor can it be said that, when once the inspector's blunder had been made, all that followed was inevitable, so that the misconveyance or detention was complete upon, and consisted only in, his causing the van to be discharged. If he had re-read the telegram, he could have undone his mistake and prevented any

(1) [1899] 1 Q. B. 309. (2) [1904] 2 K. B. 306.

H. L. (E.) 1922 L. & N. W. Ry. Co. v. Neilson. Lord Sumner.

loss to the plaintiff at any time during the next eight hours or so. It is said that "misconveyance" really means breach of the contract to convey, so that, as soon as he broke the company's contract, by conveying the goods out of the van on to the platform en route for an indefinite sojourn in the cloakroom, his act, with all that followed from it, was covered by the word. If that be so, the expression really means, "not liable for any breach of contract or the consequences thereof, unless wilful misconduct is proved," and I agree that, if that is the meaning, it is so wrapped up in deliberate obscurity as to be unavailable to the railway company, when read, as it should be, contra proferentem. I am, however, of opinion that its meaning is much narrower and is clear enough, but this does not help the appellants. I say nothing about the fact of the word being new: it must at any rate describe something which is an act of conveying done under a contract of conveyance but done wrong. Now a contract of conveyance implies a place of departure and a destination, both of which are the subjects of agreement. If, in the course of such a conveyance, goods which should go by passenger train are sent by goods train, or goods which should be covered by a tarpaulin are sent uncovered, and so forth, I can see that this novel word may be apt to describe the occurrence; but in the present case the conduct which caused the damage to the plaintiff occurred on no agreed conveyance at all. The luggage sent to Bath and other places was sent at the will of the railway company alone; the luggage placed in the cloakroom was placed there as having no further destination until either some one claimed it and gave it a new destination, or took it away, or until it came to be sold as unclaimed luggage. There was no conveyance, right or wrong, about this matter at all.

In saying this, I do not wish to be understood as adopting the appellants' argument, that "renunciation" of the contract is the test of liability. If the carriers so conducted themselves as to show that they no longer meant to be bound by the contract, the law provides for the case accordingly; if they break the contract without showing such an intention,

they must seek relief from liability somewhere in its terms. This is a matter of construction, and I am unable to see that in the circumstances the terms used can cover what occurred. I therefore think that the appeal fails.

H. L. (E.) 1922 L. & N. W Ry. Co. v. Neilson

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 12, 1922.

Solicitor for the appellants : *H. L. Thornhill.*
Solicitor for the respondent : *J. Moverley Sharp.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . Appellant ;

AND

ROYAL MAIL STEAM PACKET COMPANY . . . . . } Respondents.

H. L. (E.)* 1922 *May* 12.

Shipping—Requisition by Admiralty—Charterparty, Form B—Loss of Ship by Enemy Action—Compensation—Petition of Right—Legal Proceeding "discharged and made void"—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48, *s.* 1, *sub-s.* 1 ; *s.* 2, *sub-s.* 1 (*a*).

The Indemnity Act, 1920, s. 1, sub-s. 1, provides that no action or legal proceeding (which includes a petition of right) shall be instituted in respect of any act done during the war before the passing of the Act, if done in good faith and in the public interest by or under the authority of an official in the service of the Crown, and that if any such proceeding has been instituted before the passing of the Act it shall be discharged and made void : "Provided that, except in cases where a claim for payment or compensation can be brought under section two of this Act, this section shall not prevent : . . . . (*b*) the institution . . . . of proceedings in respect of any rights under, or alleged breaches of, contract," if the proceedings are brought within the prescribed time.

Sect. 2, sub-s. 1, provides that, notwithstanding anything in the foregoing section restricting the right of taking legal proceedings—(*a*) the owner of a ship which has been requisitioned at any time during

* *Present :* Lord Buckmaster, Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Parmoor.

H. L. (E.)
1922
ATTORNEY-GENERAL
v.
ROYAL MAIL STEAM PACKET CO.

the war "shall be entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned"; such payment or compensation to be assessed on the principles and by the tribunal thereinafter mentioned.

In March, 1915, a steamship was requisitioned by the Admiralty and was taken under a charterparty known as Form B, which fixed the rate of hire, gave the Admiralty the right of purchase at a certain price, and rendered them liable for all risks and expenses of the ship. The ship, whilst in the employment of the Admiralty, was sunk by a heavily armed German vessel, and the owners, by petition of right, claimed compensation against the Admiralty for her loss. Before the petition came on for trial the Indemnity Act, 1920, came into force, and the Crown pleaded that by virtue of this Act the petition should be discharged, and this point was tried as a preliminary question of law:—

Held (1.) that the case fell within s. 1, sub-s. 1, of the Act; and (2.) (by Lord Buckmaster, Lord Dunedin, Lord Atkinson, and Lord Sumner, Lord Parmoor dissenting) that it was excepted from the benefit of para. (*b*) of the proviso to that sub-section, inasmuch as the claim came within s. 2, sub-s. 1 (*a*), and that the petition of right should be discharged.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing a decision of Bailhache J. upon a petition of right.

On May 19, 1920, the respondents, the owners of the steamship *Alcantara*, presented a petition of right, claiming the full value of the ship, which was lost while in the service of the Crown on February 29, 1916, by reason of enemy action. The facts appearing from the petition were as follows:—

On March 15, 1915, the ship was requisitioned by the Director of Transports on behalf of the Admiralty and was taken under a charterparty of that date in the form officially known as Form B. The charterparty provided that the ship was hired for service and employment on monthly hire for three calendar months certain and thenceforward until the Admiralty should cause notice to be given to the owners that she was discharged from His Majesty's service. Clause 2 provided as follows: "The Admiralty may at any time while the said ship is so on hire as aforesaid upon giving notice to the owners of their intention so to do purchase her at the price of Five hundred and fifty-five thousand pounds (£555,000) or in case of her being required for service

as an armed cruiser they may upon giving the like notice purchase her together with such quantities of "—plate, linen, etc.—" as may be necessary for the number of Officers and Warrant Officers who shall form part of the ship's complement as an armed cruiser at the price of Five hundred and fifty-eight thousand pounds (£558,000)."

The charterparty then empowered the Admiralty to fit out the ship as a mercantile fleet auxiliary, on condition that the ship, her outfit and machinery should be restored to the owners in the same condition in which they were taken by the Admiralty, ordinary wear and tear alone excepted, and provided that the ship whilst so on hire as aforesaid should be at the absolute control of the Admiralty, and that all risk and expense of ship and stores should be borne by the Admiralty during the continuance of the ship's service under the charterparty, and it fixed the rates of hire.

On February 29, 1916, the ship, whilst in the employment of the Admiralty under the charterparty, was sunk in an engagement with the *Grief*, a heavily armed German merchantman disguised as a Norwegian tramp. The respondents, on receiving notice of the loss, sent in a claim to the Admiralty for 805,500*l.* compensation, as representing the value of the ship. The Admiralty paid to the respondents sums amounting in the aggregate to 550,000*l.*, but declined to make any further payment. The respondents claimed to recover 805,500*l.*, less the sums already paid by the Admiralty.

By his answer and plea delivered on July 16, 1920, the Attorney-General denied liability in respect of the loss of the ship to any greater amount than 558,000*l.* and paid the sum of 8000*l.* into Court in full discharge of the respondents' claim.

On August 16, 1920, after notice of the trial of the petition had been given, the Indemnity Act, 1920, received the Royal assent.

The material provisions of this Act are set out in the judgments of their Lordships.

By a further answer and plea delivered on October 18,

H. L. (E.) 1922

ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO.

1920, the Attorney-General pleaded that after delivery of his former answer and plea the said Act came into force and that he relied on it and would submit that by its operation the petition of right was discharged and made void.

By an order of the Court made on the application of the respondents it was ordered that the point of law raised by the further answer and plea should be set down for hearing and disposed of forthwith before the trial of the issues of fact arising on the position.

Bailhache J. held that the case fell within s. 1, sub-s. 1, of the Act, and that it was excepted from para. (*b*) of the proviso to that sub-section, inasmuch as it was entirely covered by s. 2, sub-s. 1 (*a*). It followed that the petition must be discharged and made void.

The Court of Appeal (Bankes, Scrutton, and Atkin L.JJ.) reversed this decision. They held that the principles of compensation provided by s. 2 were inapplicable to claims for payments due under contract or to damages for breach of contract. In their opinion the case was not covered by s. 2, sub-s. 1 (*a*), but fell within para. (*b*) of the proviso to sub-s. 1 of s. 1. They therefore held that the further plea of the Attorney-General was ill founded and that the petition could not be discharged or made void under the Indemnity Act.

1922. March 27, 28. *Sir Ernest Pollock A.-G.* and *Ricketts* for the Crown. The ship was requisitioned by the Admiralty and the charterparty under which it was taken was merely ancillary to the requisition. The Royal Proclamation of August 3, 1914, gives power to requisition and in default of agreement compensation is to be awarded by the Board of Arbitration. The petition of right ought to be discharged under s. 1, sub-s. 1, of the Indemnity Act, 1920. Para. (*b*) of the proviso to that sub-section does not apply, because the respondents' claim can be brought under s. 2, sub-s. 1 (*a*). The charterparty contains no agreement as to the sum to be paid for the loss of the ship, and the mere existence of a contract such as is contained in the charterparty is not

sufficient to take the case out of s. 2, sub-s. 1 (*a*). That provision is not excluded by the inappropriateness of the terms of Part I. of the schedule to the Indemnity Act to a case of contract. *Brooke* v. *The King* (1) is distinguishable. The decision of Bailhache J. ought to be restored.

MacKinnon K.C. and *E. F. Spence* for the respondents. The right of a subject to resort to the King's Courts can only be taken away by clear language. The claim of the respondents is founded upon breach of contract and not upon the requisition. The Board of Arbitration, which assesses the compensation payable under s. 2, never had anything to do with the enforcement of contracts, but was concerned solely with the settling of the terms of compensation where there had been no contract, and the principles laid down in Part I. of the schedule of the Indemnity Act for the guidance of the Board are inconsistent with the enforcement of contracts. The respondents do not come under sub-s. 1 of s. 1 of the Act at all, because the petition of right was not presented in respect of any act done by a person holding office or employed in the service of the Crown. Assuming that that sub-section applies, the respondents are entitled to the benefit of para. (*b*) of the proviso to the sub-section and are not excepted therefrom by s. 2, sub-s. 1 (*a*), because the latter provision deals only with a case where there has been a requisition and no agreement. Therefore the plea of the Crown is bad and the petition of right ought not to be discharged.

[They referred to *Attorney-General* v. *De Keyser's Royal Hotel.* (2)]

Sir Ernest Pollock A.-G. replied.

The House took time for consideration.

1922. May 12. LORD BUCKMASTER. My Lords, this appeal arises out of proceedings in the nature of a demurrer to a petition of right. The facts therefore must be accepted as they are stated in the petition. From this it appears that on March 15, 1915, a steamship belonging to the respondent

(1) [1921] 2 K. B. 110. (2) [1920] A. C. 508.

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Buckmaster.

company, and known as the *Alcantara*, was requisitioned by the Director of Transports and was taken under a charter-party, which fixed the rate of hire, gave to the Admiralty the right of purchase at a certain price, and rendered them liable for all risks and expenses of the ship.

On February 29, 1916, the ship, whilst in the employment of the Admiralty, was sunk by a heavily armed German vessel, and the respondents thereupon claimed against the Admiralty damage for her loss.

The first plea that was put in on behalf of the Crown admitted liability up to a certain extent, and this plea was dated July 16, 1920.

Before the petition came on for trial, however—namely, on August 16, 1920—the Indemnity Act of 1920 received the Royal assent, and the Crown accordingly amended their plea and said that by virtue of the statute the petition of right was discharged, and this point was put down for argument preliminary to the trial.

That is the only issue now before this House. It was found in favour of the Crown by Bailhache J., whose judgment was reversed by the Court of Appeal.

It follows from what I have said that the point involved is purely a question of construction of the statute. That Act, by s. 1, sub-s. 1, provided that no action or legal proceeding should be taken in respect of any act done during the war before the passage of the Act, if done in good faith and in the public interest by or under the authority of an official in the service of the Crown, and that if any such proceeding had been instituted before the passing of the Act it should be discharged and made void. A petition of right was expressly included as a legal proceeding within the meaning of this section.

It is first argued on behalf of the respondents that the circumstances of this case do not bring it within the general provisions of s. 1, but I am unable to accept that contention.

Although the vessel was sunk by the Germans, yet the loss was due to the taking and using by the Admiralty of the vessel, and it was because of the acts so done that

the respondents' claim arose. The general words therefore, in my opinion, cover this case. To these general words, however, there is an exception, which runs as follows: "Provided that, except in cases where a claim for payment or compensation can be brought under section two of this Act, this section shall not prevent— . . . . (*b*) the institution . . . . of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings" are brought within the proper time. The time condition has been satisfied in this case. The first comment to be made upon this provision is that it shows clearly that the general words in the section include claims for breach of contract, unless, indeed, the words in (*b*) are surplusage, and this I cannot accept. The respondents therefore would be outside the operation of the statute unless they could have brought a claim for compensation under s. 2, in which case the exception removes them from the benefit of the proviso.

Sect. 2 is in these terms: "2.—(1.) Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty—(*a*) being the owner of a ship or vessel which or any cargo space or passenger accommodation in which has been requisitioned at any time during the war in exercise or purported exercise of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned."

Now this ship was requisitioned, and the circumstance that the user was regulated by the terms of a charterparty does not alter this fact. The respondents, therefore, were entitled to payment for the use of the same under s. 2, sub-s. 1, but it is said that this can only apply to cases where

H. L. (E.) 1922

ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO.

Lord Buckmaster.

the requisitioning has not been associated with or regulated by a contract. The interlocking of ss. 1 and 2 defeats this argument, for the proviso at the end of s. 1, sub-s. 1, contemplates that there may be cases under s. 2 which, but for the exception, might come in, among other things, under sub-s. (*b*), and it therefore shows that the rights given under s. 2 are general and are not affected by contract in a particular case.

Finally it is urged that the subsequent provisions of s. 2, and notably sub-s. 2 (i.) and (ii.), which provide for the assessment of compensation, are inapplicable to cases where a contract has been made, and this shows that s. 2, sub-s. 1, must be in some way modified, so that it can only apply to such classes of cases as those where, even if a contract had been made for the use of the vessel, the terms both as to freight and repayment for damage or loss had not been fixed. This is the argument that found favour with the Court of Appeal. There is no doubt that the terms of the schedule do not themselves suggest that they refer to cases where contractual rights exist between the parties. But it does not follow because the freights have been regulated by contract that these provisions should be incapable of application. They are not fixed amounts, but merely a basis upon which a calculation may be fixed, and the actual terms of the contract might well be regarded in relation to such a matter. In the present case there is no agreement as to the amount to be paid for total loss unless it be found in the provision giving the Government the right of pre-emption at a fixed price, and the provisions of the schedule can therefore be made readily applicable to the existing circumstances.

The provisions of this Act of Parliament are very difficult to construe, and the difference of judicial opinion that has already emerged is not surprising.

I think that the view of Bailhache J. was correct and that this appeal should be allowed.

LORD DUNEDIN. My Lords, I concur with your Lordships in thinking that the judgment of Bailhache J. is right, but

as the Court of Appeal has reversed that judgment I think it right to state my opinion.

The first question is, Does what was done fall within s. 1 of the Act at all? Here I am able to go along with the Court of Appeal; they thought it did. It seems to me that it depends upon a question of fact: Was what was done something done either by some one himself acting on behalf of the Crown, or by any one acting under such a person's orders, in the execution of duty and for the public safety? The requisitioning of a ship falls, I think, within that description, nor does it matter that the requisitioning eventuates in a contract being made. The fact of the contract did not wipe out or change the nature of the original act. Further, obviously the terms of para. (*b*) of the proviso show that there are cases of contract which fall within s. 1, sub-s. 1.

The next step is easy, there being a contract on which the suppliants could sue, they are protected under the said para. (*b*) of the proviso unless that proviso is made unavailing to them in respect of the exception therein expressed. Now the exception expressed is that the proviso is not to apply where a claim for payment or compensation can be made under s. 2. I turn to s. 2 and there I find that where a person is the owner of the ship which has been requisitioned he is to be entitled to payment or compensation, as the case may be, and that that payment or compensation must be awarded by a special tribunal. If these were all the words I think that the Court of Appeal would have agreed with Bailhache J., but then there are added the words that payment or compensation is to be assessed on the principles thereinafter mentioned. The principles are set forth in s. 2, sub-s. 2, and the principles applicable to cases falling under s. 2, sub-s. 1 (*a*), are to be those set forth in Part I. of the schedule. Part I. of the schedule says that payment for hire is to be in accordance with certain Blue Book rules, and that, when there is damage to or loss of a ship, compensation shall be made for such damage or loss. Now the learned judges in the Court of Appeal say the mention of Blue Book rules gives a standard which clearly will not fit with the provisions of an actual

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Dunedin.

contract and therefore they cannot think that the section applies at all.

My Lords, I cannot agree with this argument. If the words are plain, and I think they are plain, they must be given effect to and the Blue Book rules must supersede the contract. No one ever escaped the bed of Procrustes because it did not fit. But in the present case I do not think that either the difficulty or the seeming hardship arises, for in this case the contract is silent as to a bargain as to what is to be paid if the ship is lost. The provision as to what was to be paid upon purchase may of course be evidence of value, but it has no further function; and as such evidence it is equally cognisable by an ordinary Court or by the special tribunal, which will find nothing in the Blue Book rules to trammel their judgment as to whether that evidence is or is not conclusive.

For these reasons I concur in the motion made by my noble friend on the woolsack.

LORD ATKINSON. My Lords, I concur. This appeal raises a preliminary point of law—namely, whether the Indemnity Act of 1920 prevents the suppliant company, hereinafter referred to as "the Company," from having their petition of right heard in the King's Bench Division.

The facts stated in the petition must, it is admitted, be for the purpose of this case taken as true. The second paragraph of the petition opens with the statement that on March 15, 1915, the steamship *Alcantara*, the property of the company, was requisitioned by the Director of Transports on behalf of the Admiralty, and was taken under a charterparty of that date which was officially known as Form B. The charterparty took the form of a demise of the company's vessel to the Admiralty on behalf of His Majesty for service and employment on monthly hire from March 9, 1915, for the space of three calendar months certain, and thenceforward until the Admiralty should cause notice to be given to the owners that the ship was discharged from His Majesty's service. The hire to be paid for the ship is fixed at 12*s.* per

ton per month to be reduced to 11*s.* after two months, applicable to the whole period if the vessel was retained in the service for six months. As the registered tonnage of the ship was 15,831 tons this must have amounted to a very considerable sum. The charterparty contained a clause enabling the Admiralty to purchase the ship at any time while she was on hire for a sum of 550,000*l.*, or in case of her being required as an armed cruiser, as in fact she was, for a sum of 558,000*l.* No clause was contained in the charterparty providing expressly that the Admiralty should be liable to pay compensation to the owners if their vessel should, while in the service of the Admiralty, be lost, much less fixing the amount of such compensation if she were lost. This is, in my view, having regard to the provision of s. 1, sub-s. 1, of the Indemnity Act, a rather important matter.

There is a clause, however, in the charterparty which runs as follows: "3. The Admiralty may at any time alter or remove all or any of the fittings or arrangements on board the said ship, and may erect any new fittings which may be required to render the ship available for service as a mercantile fleet auxiliary, provided that the said ship, her outfit and machinery shall, at the cost of the Admiralty, be restored to and be given up to the owners in the same condition in which they were when taken by the Admiralty, ordinary wear and tear alone excepted."

This ship was, on February 29, 1916, while in the service of the Admiralty under the charterparty, lost not by the act or default of any officer or person in the employment of His Majesty or of any person under the authority of such officer, or by the act or default of any of the officers or members of her crew, but by the direct act of the German enemy. She was sunk in an engagement with a heavily armed German enemy merchantman, named the *Grief*, disguised as a Norwegian tramp. The company claim by their petition of right to recover, in respect of the loss of their ship, the sum of 805,000*l.* less a sum of 550,000*l.* received by them.

The petition does not contain any statement as to the

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Atkinson.

ground, breach of contract or other, upon which their demand is based. On October 18, 1920, the Attorney-General, on behalf of His Majesty, filed a second or further plea and answer to the company's petition, giving the Court to understand and be informed that, after the delivery of his first answer and plea, on August 16, 1920, the Indemnity Act of 1920 came into force, that he relies upon it, and submits that by its operation the petition of the company is discharged and made void. By an order made upon summons by the Master of the Court, it was ordered that the point thus raised should be set down for hearing and disposed of before the trial of the issue of fact arising on the petition. Before dealing with the Indemnity Act it is necessary to refer to the provisions of the proclamation dated August 3, 1914. This proclamation empowered the Admiralty, by warrant under the hand of one of the officers of the Crown therein mentioned, to requisition and take up for the service of the Crown any British ship or vessel, as defined by the Merchant Shipping Act of 1894, within the British Isles or the waters adjacent thereto, for such period of time as might be necessary on condition that the owners of all ships and vessels so requisitioned should receive payment for their use and for the services by them rendered during their employment in Government service and compensation for the loss thereby occasioned, according to terms arranged, as soon as possible after the ships had been taken up, by mutual agreement between the Lords of the Admiralty and the owners, or, failing such agreement, by the award of a Board of arbitrators to be constituted and appointed by the Crown for that purpose. The Lords of the Admiralty did in the present case, by mutual agreement with the company (i.e., by the charterparty), arrange the sums they should pay for the use and services of the *Alcantara*. They did not arrange by mutual agreement or at all what compensation the owners should receive in respect of the loss of their ship while performing the services she was taken up to perform. That being so, under this proclamation the Board of arbitrators, subsequently instituted by notification dated August 11,

1914, became the tribunal on whom the task of settling the amount of this compensation devolved.

It could not, in my view, be reasonably contended that, by the entering into such an agreement as is in this proclamation mentioned, the requisition of the ship was revoked, nullified, or put an end to. And I think it is equally clear that in the present case the requisition was not by the entering into the charterparty revoked, nullified, or put an end to, so as to leave the respective rights, liabilities and remedies of the Crown and the company to be determined and enforced as if the charterparty was an agreement entered into between these parties irrespective of all requisitioning. I think, on the contrary, that this vessel was, when sunk by the act of the German enemy, a requisitioned ship in the service of the Admiralty. Sect. 1, sub-s. 1, of the Indemnity Act has two limbs. The first limb prohibits the future institution of any action or other legal proceeding, civil or criminal (including a petition of right), in respect of the matters thereinafter mentioned. The second limb deals with similar proceedings which have been instituted either before or after the passing of the statute, and declares that these latter shall be discharged and be void; but the basis upon which each class of action or proceeding must rest is the same—namely, any act, matter or thing done during the war, before the passing of the Act, in good faith, or done or purported to be done in the execution of his duty, or done for the defence of the realm or for the public safety, or for the enforcement of discipline or otherwise for the public interest by any person holding office under or employed in the service of the Crown in any capacity, or by any other person acting under the authority of a person so holding office or so employed; that is to say, it is the action of the officers and employees of the Crown and of those other persons acting under their authority which is the foundation upon which all the legal proceedings mentioned in this sub-section must be based. I am at a loss, therefore, to see how an action or proceeding based upon the act of an alien enemy in sinking a ship comes within s. 1, sub-s. 1, of this statute. One can

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Atkinson.

well imagine a case in which an act of an officer of the Crown might involve a breach by the Crown of a contract entered into on its behalf with a subject, and be the ground of a petition of right. For instance, if ammunition or other goods sold during the war by a contractor to the Crown were loaded on a vessel in the service of the Crown and commanded by one of the officers of the Crown to be safely carried to a named destination, and this commander, though acting in all good faith, and doing what he considered to be best, steamed too fast through a fog, came into collision with another ship and lost or damaged his cargo, a suit instituted in respect of this loss or damage might reasonably fall within proviso (*b*) of s. 1, sub-s. 1, of the Indemnity Act, but the present case is wholly different from such a case as that.

In my opinion, therefore, the respondents cannot obtain relief under this s. 1, sub-s. 1. The ship, being a requisitioned ship, when she was sunk, the owners would, prima facie, be entitled to obtain compensation under s. 2, sub-s. 1 (*a*), of the Indemnity Act.

It is, however, provided by sub-s. 2 (ii.) of that section that where compensation is claimed under s. 2, sub-s. 1 (*a*), it shall be assessed in accordance with the principles upon which the Board of Arbitration, constituted under the proclamation of August 3, 1914, has hitherto acted, which principles are set forth in Part I. of the schedule of the Act. The Court of Appeal have, as I understand them, held that the effect of this provision is to exclude the claim of the suppliants for compensation from s. 2, sub-s. 1 (*a*). With the most genuine respect for the learned Lords Justices, I am entirely unable to take that view.

When one turns to Part I. of the schedule, one finds that in the first eight and a half of its lines the sums to be awarded in respect of the use of a ship or vessel, or cargo space, or passenger accommodation therein, or services rendered, are alone dealt with. These sums are to be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where these rates or conditions have not been applied, on some liberal estimate of the profits which the

owner could have made had there been no war. The schedule then goes on to provide that in addition to the compensation recoverable by the owner under the provision of these eight lines, he is to recover compensation for loss or damage of the ship or vessel directly due to her use. Here the loss of the vessel was, in my view, directly due to her use as an armed cruiser. The principles of the Blue Book do not apply, in my view, to the estimation of the compensation to be paid for her loss at all. I see nothing, therefore, in the schedule which debars the owners of this vessel from obtaining just and adequate compensation from the Arbitration Board under the provisions of s. 2, sub-s. 1 (*a*). I am, therefore, of opinion that the judgment appealed from was erroneous and should be reversed, that the judgment of Bailhache J. was right and should be restored, and this appeal be allowed with costs here and in the Court of Appeal.

Lord Sumner. My Lords, except out of respect for the Court of Appeal I should not trouble your Lordships with my reasons for concurring in the motion proposed. The critical question appears to be, whether the first paragraph of the First Part of the schedule to the Indemnity Act is so inappropriate to this case as to prevent it from falling within the words "except in cases where a claim for payment or compensation can be brought under section two of this Act." On this point two views have been taken: the first, that the schedule is inapplicable to contracts generally and especially to contracts for the use of a ship, because it fixes the amounts to be paid otherwise than by reference to the terms of the contract itself; the second, that at any rate it is inapplicable to the present case, because, where a loss of the ship has occurred, which is directly due to the use of it, there is to be awarded under the schedule simply a sum by way of compensation in respect of such loss without mention of the contract. The first is the view of the Lords Justices.

Bankes L.J. says "the suppliants' claim, based as it is upon a contractual obligation by the Admiralty, is or may be quite inconsistent with the principle upon which the Tribunal

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Sumner.

is directed to assess their loss." Scrutton L.J., speaking of the schedule, adds: "It appears to me to be quite inapplicable to claims for payments due under contract or to damages for breach of contract and to have been drawn without any reference to such claims." This view I am unable to accept. That some contracts may fall within s. 1, sub-s. 1, is clear from the proviso, para. (*b*). The exception out of the proviso shows that, in some cases of contract, claims may be brought under s. 2, and I see no sufficient ground for limiting the exception to the other paragraphs of the proviso, to the exclusion of (*b*). If so, no kind of contractual case falls more naturally under s. 2 than one in which the owner of a ship which has been requisitioned, though on terms subsequently expressed in a charter, is entitled to payment accordingly. I think further that, if any cases of that kind are to be excluded from the application of the first schedule, they cannot be the whole class of contractual obligations, as such, but must be those specific cases only, to which in the particular circumstances the schedule is found to be inapplicable. The words in the exception of the proviso are "in cases"—that is individual cases—"where a claim for payment can be brought," and not "in such classes of case as can be brought" under s. 2. If the particular case now in question is to be held to be one, to which the schedule does not apply, it must be on grounds arising out of the particular claim made, and out of the particular stipulations agreed to.

The second and more restricted view appears, therefore, to be that there is something in the terms of the actual charter entered into, which gives to the suppliants rights in respect of the loss of the *Alcantara* beyond what is covered by the words of the schedule—namely, "a sum by way of compensation in respect of such loss or damage." Of the contention that the price, at which the Admiralty receives an option to purchase the ship, in some way limits the compensation to be paid in the event of her loss, it would be premature to express any opinion. If it is so, however, the schedule is phrased more favourably to the suppliants

than is the contract; but in other respects I do not see how the schedule affects, and certainly not how it limits, the measure of the compensation.

I will only add that I think the decision in *Brooke* v. *The King* (1) entirely distinguishable.

LORD PARMOOR. My Lords, I am unable to concur in the opinions which have been expressed by your Lordships, and I think that the judgment of the Court of Appeal should be affirmed. The petition of right presented by the respondents states that on, or about, March 15, 1915, the steamship *Alcantara* was requisitioned by the Director of Transports for, and on behalf of, the Admiralty, and was taken under a charterparty of that date, which was in the form officially known as Form B. I agree in the view taken by the Court of Appeal that this allegation in the petition should be taken to allege that the *Alcantara* was requisitioned on the condition that the respondents should receive payment, or compensation, under the terms of the charterparty. The obligations of the Admiralty were made to depend not on the act of requisition, but on the terms of the charterparty. The charterparty placed on the Admiralty a liability to restore the ship in the same condition in which she was taken, ordinary wear and tear alone excepted, and to bear all risks during the continuance of the ship's service under the charterparty.

On April 4, 1916, the Admiralty gave notice, by letter, of the loss of the ship, and by such letter declared that the hiring under the charterparty was at an end, as from February 29, 1916. Apart from any disability imposed by the terms of the Indemnity Act, 1920, the respondents would have been entitled to claim damages either for the failure of the Admiralty to restore the ship, or on the covenant that all risk during the continuance of the ship's service, under the charterparty, should be borne by the Admiralty. After the passing of the Indemnity Act, 1920, the Attorney-General entered a further answer and plea to the petition, submitting

(1) [1921] 2 K. B. 110.

H. L. (E.) 1922

ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO.

Lord Parmoor.

that by the operation of that Act the petition was discharged and made void.

The question on appeal depends upon the construction of the Indemnity Act, 1920. Sect. 1, sub-s. 1, of the Act includes the case presented by the respondents in their petition. The *Alcantara* was requisitioned, and the terms of the contract were arranged in good faith by a person employed in the service of the Crown, and acting in the execution of his duty. Hence, apart from the subsequent provisions or limitations of the Act, the contention of the Attorney-General would prevail, and the petition should be discharged and made void. It is provided, however, that except in cases where a claim for payment or compensation can be brought under s. 2 of the Act, s. 1 shall not prevent the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within the prescribed time. The respondents in their petition state a claim, made within the prescribed time, and founded on alleged breach of contract. They are therefore entitled to proceed on their petition, unless the exception applies and they can bring a claim for payment or compensation under s. 2 of the Act.

The real difficulty in the case depends on the construction of s. 2 of the Indemnity Act, 1920. The question to be determined is whether this section applies where legal proceedings are taken to enforce the payment of amount due under contract, or as damages for alleged breach of contract, in cases in which after requisition a contract has been entered into by mutual consent, or is restricted to cases where no contract has been made, and the subsequent liability of the Admiralty arises from the act of requisition. The language used in the section is not inconsistent with either of these alternative contentions. The Court of Appeal has unanimously accepted the more restricted contention. I agree in their decision.

Sect. 2 gives a right to payment or compensation in the cases under (*a*) and (*b*), and in other cases directs that compensation should be assessed under the provisions of sub-s. 2 (iii.). Under (*a*) and (*b*) there is no option, and

payment, or compensation, can only be assessed on the principles, and by the tribunal therein mentioned, whose decision shall be final, subject to a right of appeal, on any point of law, to the Court of Appeal, and by leave given, to this House. Where payment or compensation is claimed under (*a*) the tribunal is the Board of Arbitration constituted under the proclamation issued on August 3, 1914, and the principles to be applied are set forth in Part I. of the schedule to the Act. In the present appeal compensation for breach of contract is claimed, but the same considerations would apply if the claim had been one for payment for the use of the steamship *Alcantara*. The result of applying these terms, where a mutual agreement has been made, is that for the purpose of claims or compensation, all charterparty contracts in Form B consequent on requisition, would be set aside and rendered void. There would be a clean sweep of contractual obligations affecting payment or compensation, and the substitution therefor of a statutory tribunal and statutory principles. If this intention is expressed in the language of the Legislature effect must be given to it; but the alternative and more restricted contention appears to me to be equally in accord with the language used. Adopting this construction, claims under (*a*) would have no reference to payments under contract, or for damages for breach of contract, and are not applicable to such claims. Atkin L.J. says that to any one who knows the number of cases in which the terms of requisition were arranged as being on the terms of the form of charterparty set out in the "Blue Book Reports" mentioned in the schedule, it is incredible that the Legislature meant either to avoid and discharge all mutual agreements arranging the terms of requisition. I have no knowledge of the number of cases in which the terms of requisition were agreed in a charterparty in Form B, but I agree with the Lord Justice in adopting the alternative construction that s. 2, sub-s. 1 (*a*), is limited to cases where terms have not been arranged by mutual agreement.

The argument in favour of this contention appears to me to be strengthened by reference to the other portions of s. 2.

H. L. (E.) 1922 ATTORNEY-GENERAL v. ROYAL MAIL STEAM PACKET CO. Lord Parmoor.

The same difficulties arise in including contractual obligations under (*b*) and sub-s. 2 (iii.) as arise in the case of (*a*). I think that s. 2 is not intended in all these cases to set aside contracts entered into by the Government, and to introduce a statutory principle and scale, which may be wholly inconsistent with terms arranged by mutual agreement. The opinion expressed by Scrutton L.J. that s. 2 of the Indemnity Act has no reference to claims for payment under contract or for damages for breach of contract appears to me to be correct.

In my opinion the appeal should be dismissed.

Order of the Court of Appeal reversed, and judgment of Bailhache J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 12, 1922.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Bristows, Cooke & Carpmael.*

[HOUSE OF LORDS.]

PERCY (PAUPER) . . . . . APPELLANT; H. L. (SC.)*

AND 1922

CORPORATION OF CITY OF GLASGOW RESPONDENTS. *May* 26.

False Imprisonment — Master and Servant — Liability for Acts of Servant — Scope of Authority — Corporation as Tramway Owners — Statutory Powers — Improper Exercise — Giving Passenger into Custody — Action for Damages — Relevancy.

In an action of damages brought against the Corporation of Glasgow the pursuer averred that he tendered in payment of his fare as a passenger on a Corporation tramway car a penny which was slightly indented but was a proper tender; that the conductor rejected the coin and summoned an inspector, who demanded another penny, which the pursuer declined to pay; that the conductor and inspector then gave the pursuer into custody on a charge of refusing to pay his fare, notwithstanding that he had offered them his name and address. The pursuer further averred that it was part of the duty of the conductor and inspector to prevent any passenger evading payment of his fare and that they were empowered under the byelaws made under the Corporation Tramways Acts to seize and detain any such passenger whose name or residence was unknown to them until discharged in due course of law; that it was within the general scope of the authority of the conductor and inspector as employees of the Corporation and in the course of their employment to give into custody any person in their opinion detected in an attempt to defraud the Corporation by evading payment or tendering improper coins. He then charged the conductor and inspector with having acted recklessly, maliciously, and in an excess of zeal in giving the pursuer into custody, in that they did not properly examine the coin tendered and in that they knew the pursuer's name and address, which he had given them, and alleged that the Corporation as the employers of the conductor and inspector were responsible for their actions. The defenders pleaded that the pursuer's averments were irrelevant:—

Held, that the averments meant that the conductor and inspector, acting in the course of and within the general scope of their employment, improperly exceeded the power conferred by the byelaws upon their employers, the Corporation, in which case the Corporation would be liable, and that the action should be allowed to proceed to trial.

Goff v. *Great Northern Ry. Co.* (1861) 3 E. & E. 672; *Moore* v. *Metropolitan Ry. Co.* (1872) L. R. 8 Q. B. 36; and *Lundie* v. *MacBrayne* (1894) 21 R. 1085 applied.

Decision of the First Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Ashmore).

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD WRENBURY.

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION.

The appellant was a machine hand in a Glasgow newspaper office, and the respondents, the Corporation of Glasgow, were the owners and managers of the municipal tramway system of that city. The appellant brought this action against the respondents for damages for wrongous detention.

The facts giving rise to the action, as stated by the appellant in arts. II., III. and IV. of his condescendence, were shortly as follows :—

On July 22, 1920, the appellant was a passenger on one of the tramway cars belonging to the respondents and in charge of their servants. In the course of his journey the appellant tendered to the conductor of the tramway car one penny in payment of his fare. The coin tendered by him was slightly marked or indented, but was not defaced, and it was sufficient and proper tender of his fare. The conductor refused to accept the coin tendered by the appellant and demanded another coin, which the appellant declined to give. The conductor repeated his demand and thereafter summoned a tramway inspector. The inspector demanded another penny from the appellant, which the appellant again declined to pay. Thereupon the inspector and conductor summoned a police constable and gave the appellant into his custody on a charge of refusing to pay his fare, notwithstanding the fact that the appellant had offered the tramway officials his name and address. The appellant was then removed by the constable from the tramway car and was taken along the public street to the police station, where he was again charged with not paying his fare and also with tendering a defaced coin. The appellant was detained in the police office for about ten minutes and was then liberated. On the following day he called back at the police office, when he was informed that the matter was finished and that the charge against him was a foolish one.

Condescendence V., so far as material, was as follows :—

" . . . . In giving the pursuer in charge as above described the servants of the defenders acted wrongly, illegally, oppressively, recklessly and maliciously. . . . . It was part of the duty of the said conductor and the said inspector to

prevent any passenger evading or attempting to evade payment of his fare, and they were empowered under the bye-laws and regulations relating to the Corporation tramways made under the powers conferred by the Glasgow Corporation Tramway Acts, 1870 to 1893 (which byelaws and regulations are referred to for their terms), to seize and detain any such passenger whose name or residence was unknown to them until such passenger could be conveniently taken before a magistrate, or until he were otherwise discharged in due course of law. The said conductor and the said inspector in rejecting the pursuer's coin as aforesaid were acting within the general scope of their authority as employees of the defenders. Further, in addition to enforcing payment of the passengers' fares, it was within the scope of the authority and in the course of the employment of the said conductor and of the said tramway inspector, and in the supposed furtherance of the interests of the defenders, to give into custody of the police any member of the public who should in their opinion be detected in an attempt to defraud the defenders by attempting to evade payment of his fare or tendering improper coins. If the said conductor and the said inspector had exercised due care in examining the coin tendered by the pursuer they would have seen that they had no ground for exercising said power in the case of the pursuer. The name and residence of the pursuer were known to the said conductor and the said inspector. The pursuer gave the said conductor and inspector his name and address at the time. The said conductor and the said inspector, however, recklessly, maliciously, and in an excess of zeal, and in the furtherance of the defenders' interests gave the pursuer into custody as above narrated. The defenders, as the employers of the said conductor and inspector, are in law responsible for their action."

Byelaw No. 4 (*c*) of the byelaws and regulations above referred to provided that any person who evaded or attempted to evade payment of his fare should be liable to a penalty, and it proceeded as follows: "And it shall be lawful for any officer or servant of the Corporation and all persons called by

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION.

him to his assistance to seize and detain any such passenger whose name or residence is unknown to such officer or servant until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law."

The respondents pleaded (inter alia) (1.) that, the pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed; and (3.) that the said conductor having acted in the manner complained of without malice and with probable cause the defenders should be assoilzied.

Upon these averments the Lord Ordinary approved the following issue: "Whether on or about July 22, 1920, in or near Queen Street, Glasgow, the pursuer was wrongously and illegally given into the custody of the police by a servant or servants of the defenders and thereafter taken along the public street to the Central Police Office, Glasgow, to the loss, injury and damage of the pursuer."

The First Division (the Lord President, Lord Mackenzie, Lord Skerrington, and Lord Cullen) recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant upon the ground that, the pursuer having launched his case upon the statutory powers of the Corporation, under the byelaw above set out it was a condition precedent to the exercise by a tramway officer of the power of detaining a passenger that the name and residence of the passenger should be unknown to him, and that the pursuer, by averring in terms that his name and address were known both to the conductor and to the inspector had shown that those officials were acting outside their authority, and had pled himself out of Court.

May 23, 25. *Morrice Mackay K.C.* (with him *J. G. Burns*) (both of the Scottish Bar) for the appellant. The case as averred by the appellant is relevant and ought to proceed to trial. The interlocutor of the First Division proceeds upon a misconstruction of the appellant's averments. The true meaning of those averments, so far as they relate to the byelaws, is that the employees of the respondents in the exercise of a power to detain a passenger who is attempting to evade

payment of his fare acted negligently and with excess of zeal and upon a mistaken view of the specific power conferred by the terms of the byelaw. Where a power to detain till liberation in a due course of law is conferred by Parliament upon a Corporation through its servants and officers the Corporation is liable for a mistaken exercise of that power on the part of its servants and officers. The byelaw made under statutory authority is really a mandate to the Corporation to do certain things through its servants and is not a delimitation of the authority of the servants. Further, the First Division have overlooked the fact that the appellant's averments are not limited to the byelaw, but state a general authority to give into custody any member of the public who should in the opinion of the tramway officials be detected in an attempt to defraud the respondents by evading payment of his fare or tendering improper coins. Such a mandate is necessary for the protection of the respondents and it is impossible to maintain that whenever the official steps outside the power of the Corporation his mandate has failed, otherwise there could never be an action against the Corporation for false imprisonment: *Moore* v. *Metropolitan Ry. Co.* (1); *Goff* v. *Great Northern Ry. Co.* (2); *Smith* v. *North Metropolitan Tramways Co.* (3); *Hutchins* v. *London County Council.* (4)

[VISCOUNT HALDANE referred to *Lloyd* v. *Grace, Smith & Co.* (5)]

The same principles apply in Scotland: *Lundie* v. *MacBrayne* (6); *Harvey* v. *Sturgeon* (7); *Shearer* v. *Shields.* (8) Of the cases cited on behalf of the Corporation in the Courts below the first—*Riddell* v. *Glasgow Corporation* (9)—has no near analogy to the present case; the others—*Buchanan* v. *Glasgow Corporation* (10); *Coutts* v. *MacBrayne* (11);

(1) L. R. 8 Q. B. 36, 39.
(2) 3 E. & E. 672.
(3) (1891) 7 Times L. R. 459.
(4) (1915) 32 Times L. R. 179; 80 J. P. 193.
(5) [1912] A. C. 716, 737.
(6) 21 R. 1085.
(7) 1912 S. C. 974.
(8) [1914] A. C. 808; 1914 S. C. (H. L.) 33.
(9) 1911 S. C. (H. L.) 35.
(10) (1905) 7 F. 1001.
(11) 1910 S. C. 386.

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION.

M'Cormack v. *Glasgow Corporation* (1)—do not deal with the question of the scope of authority at all.

H. P. Macmillan K.C. (with him *Archibald Crawford*) (both of the Scottish Bar) for the respondents. The drastic power of arrest conferred by the byelaw is limited to cases where the name and address of the passenger are not known. The pursuer takes that byelaw as the authority to the tramway officials and then says that his name and address were known. There is no common-law power in the servants of the Corporation to arrest. That would be plainly outside the scope of the servants' authority. Therefore the pursuer invokes the byelaw, but he then proceeds to discard the very class of cases to which the byelaw applies. He has launched his case on the byelaw and has pleaded himself out of Court. Prima facie a master is not liable if a servant arrests a member of the public, even if he does so in furtherance of his master's interest. It is the duty of the pursuer to bring home the liability of the Corporation and this he has failed to do.

Morrice Mackay K.C. replied.

VISCOUNT HALDANE said that their Lordships would give judgment to-morrow morning.

1922. May 26. VISCOUNT HALDANE. My Lords, on the probability of the claim in these proceedings succeeding I have not at this stage to form any opinion. But I find myself unable to agree with the First Division, which has dismissed the action on the question of relevancy simply. I think that the appellant is entitled to have the issues he has raised tried out.

In his condescendence, the averments in which we must assume for the purpose of the point before us to be true, the pursuer alleges that he tendered to the conductor a penny in payment of his fare as a passenger on a tramway car belonging to the respondents and in charge of their servants. He avers that the coin tendered was slightly marked but not defaced, and that it was a sufficient and proper tender of his

(1) 1910 S. C. 562.

fare. He alleges that the conductor refused to accept the penny and demanded another one in its place, and, on his own refusal to give a different penny, summoned a tramway inspector, who agreed with the conductor. He further alleges that when he declined to comply with this demand, the inspector and conductor summoned a police constable and gave him into custody, which lasted for a brief period. This, he says, was a wrongful act on their part as the servants of the respondents, and he claims damages from the latter.

In para. V. of his condescendence the pursuer refers to the byelaws and regulations made under the powers conferred by the Glasgow Corporation Tramway Acts, 1870 to 1893. These, he says, empowered the conductor and the inspector to seize and detain any passenger whose name or residence were unknown to them, until he could be taken before a magistrate or until otherwise discharged in due course of law. In what they did in his own case he avers that the conductor and the inspector were acting within the general scope of the authority entrusted to them by the respondents, and that the scope of their authority extended to giving into custody any member of the public who should in their opinion be detected in an attempt to defraud by evading payment of his fare or tendering improper coins. He charges the conductor and the inspector with not having exercised due care in what they did, not only because they did not properly examine the coin tendered, but in that they knew the pursuer's name and address by reason of his having given them to them, and that accordingly they acted maliciously, in a fashion for which the respondents are in law responsible.

The Lord Ordinary sent the case for trial by a jury. The Inner House recalled his interlocutor and dismissed the action as irrelevant. The reasons are given most fully in the judgment of the Lord President. He held that the pursuer's averment amounted as it stood to this, that the conductor and the inspector knew at the time they purported to enforce the byelaw that the condition upon which alone they had power to enforce it did not exist. For the pursuer had himself stated that he had given them his name and address and

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION. Viscount Haldane.

that they knew them. The learned Lord President found no alternative case set up that, independently of the byelaw, the giving into custody of a passenger who had tried to avoid payment of his fare was within the general authority committed to the Corporation's tramway employees. He therefore considered that the pursuer had pled himself out of Court. For the respondents had given no authority to arrest in the circumstances stated. The other learned judges in the First Division concurred.

My Lords, I am unable to agree with this interpretation of the condescendence. The pursuer states that he had made a sufficient and proper tender of his fare and that in mistakenly refusing to accept it, and in having him arrested, the conductor and inspector were acting, although mistakenly, "within the general scope of their authority as employees of the respondents." The citation of the byelaw I read was really made in order to show what the scope of this authority was. The employees were not bound to believe the appellant when he gave a name and address. It is therefore not clear that they have been sufficiently alleged to have known it. But in any view, if they were acting within the scope of what they were employed to do, although they acted mistakenly, the respondents are responsible for what they did, in accordance with well-settled principles.

As was laid down by Story in a passage adopted in an earlier case by Blackburn J. and approved in this House in *Lloyd* v. *Grace, Smith & Co.* (1), "the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.'" The limitation is that "'the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless

(1) [1912] A. C. 716, 737.

he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.' "

My Lords, I am of opinion that in the circumstances alleged the employees were alleged to have been, within the language of the passage from Story which I have quoted, agents acting within the scope of their agency. I think, therefore, that the pursuer had on this footing the right to have the issues of fact, which appear to me to have been relevantly stated, tried. If this be true, the interlocutor of the Inner House should be recalled and that of the Lord Ordinary restored. So far as this appeal is concerned, the appellant having sued in forma pauperis is not entitled to more costs than are usually allowed in such cases.

VISCOUNT FINLAY. My Lords, I am of the same opinion. The facts in this case lie in a very small compass. The pursuer was travelling by one of the Corporation's tramway cars, and a dispute arose between him and the conductor as to a coin, a penny piece, which he tendered in payment of his fare. The dispute ended, according to the pursuer's allegations, in his being arrested and kept for some short time in custody. He brings this action against the Corporation for the act of their servant, the conductor, and the question that has been raised is as to the effect of the pleadings on the liability of the Corporation.

The classical passage with regard to questions of this kind is to be found in a judgment given by Willes J. in *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), which is quoted in Pollock's Law of Torts, 11th ed., p. 91, and was read in the course of the argument. It is this: " A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which

(1) (1872) L. R. 7 C. P. 415, 420.

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION. Viscount Finlay.

it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

In the present case reference was made to a byelaw with regard to tramways; that byelaw is set out at p. 9 of the appendix and it is only necessary to read the last sentence of para. 4, which contains the material words: "It shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger" (that is any passenger who evades or attempts to evade payment of his fare) "whose name or residence is unknown to such officer or servant until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law."

Now, it appears to me that these words "whose name or residence is unknown to such officer or servant" must mean that the case in which the power to act as described in the byelaw is excluded is where the servant knows—has knowledge of—the name and address of the passenger in question. It is impossible to read the byelaw as excluding from its operation any case in which the passenger gives his name and address to the conductor, because where there were any circumstances of bad faith it would be natural enough that a false name and address should be given, and what the byelaw is referring to is a case where the servant of the Corporation knows what the passenger's name and address are, and it limits the authority in such cases.

Well, my Lords, in the present case the pleadings contain certain averments bearing upon this point, and it is upon these averments that the decision of the First Division in the present case really turned. In giving the narrative of what happened the pursuer says in Condescendence V.: "The name and residence of the pursuer were known to the said conductor and the said inspector. The pursuer gave the said conductor and inspector his name and address at the time." My Lords, it appears to me to be the fair and natural meaning of these words that the pursuer says, "I gave my name and address at the time and therefore they cannot say

that they did not know." I cannot read it as an allegation that the conductor actually knew the name and address. He had, of course, the name and address according to the allegation given to him by the passenger; it does not follow that he knew the name and address in the sense in which the words are used in the byelaw, because they import that the servant actually knew what the real name and address were.

Now, that appears to me to be the natural meaning of these words occurring in Condescendence V., and that is the sense in which they were understood by the defenders, because in their answer there occurs this passage: "Admitted that the pursuer tendered a name and address, but explained that the defenders' servants had no knowledge of the pursuer, and had no means of verifying the name and address which he gave."

I cannot read that allegation in the pleadings as amounting to a statement made by the pursuer that his name and residence were known to the conductor. The judgment of the Lord President turns entirely upon the reading which he gives to those words in Condescendence V. which I have just read. It is unnecessary and it is undesirable at this stage of the case to express any opinion whatever as to what the effect of such an allegation might have been if it had borne the meaning which the Lord President puts upon it. I do not enter into that question, because all that I desire to do at present is to deal with this case so far as is necessary for the purpose of disposing of the present appeal. What the Lord President said will be found at pp. 6, 7 and 8 of the appendix, and for the purpose of making my meaning clear I must read a few sentences from what he says on these pages. The Lord President says this: "But the pursuer goes on, in the same condescendence, to explain that 'the name and residence of the pursuer were known to the said conductor and said inspector.' A further averment is made: 'The pursuer gave the said conductor and said inspector his name and address at the time.' The pursuer had already stated as much in Condescendence IV." I would only observe upon that that

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION. Viscount Finlay.

I think it is necessary for the purpose of seeing what was really meant in Condescendence V. to take these two sentences, the second of which follows close upon the first, together in order to see what the real gist of the averment is. The Lord President continues: "This averment has been allowed to remain in its present form notwithstanding suggestions from the Bench that it might be withdrawn or altered, if the facts admitted of it. Its plain meaning is that the inspector and conductor knew, at the time they purported (according to the pursuer) to enforce the byelaw, that the condition upon which alone the powers of that byelaw were within their authority to use did not exist." I pass on, omitting a passage which for the present purpose is not material. "He says" (that is the pursuer) "that the inspector and conductor were empowered to seize and detain a passenger by a byelaw which applied in a certain specified event. He then says, not only was that event not fulfilled, but the inspector and conductor knew that it was not fulfilled. For the pursuer to attempt to make the employers liable in these circumstances is impossible. He avers action which was not under the scope of the employees' authority, and which (he says) they knew was not under the scope of their authority. I think, accordingly, we have no alternative but to take the pursuer at his word, and refuse the issue he asks."

My Lords, I think it is rather dangerous, for the purpose of disposing finally of an action, "to take the pursuer at his word"—to adopt the phrase employed in the passage which I have just read. There is the averment contained in the pleadings, and while it is necessary to be very sure indeed of the meaning of that averment and what it really carries with it before the case is finally decided upon the point, in the present case it seems to me to be quite clear that the averment was misconstrued in the First Division. I do not think that the words bear out the interpretation put upon them for the purposes of the present judgment. What effect they might have had upon the subsequent fortunes of the case if that had been the true interpretation of the

pleadings, it is, as I have already said, unnecessary and undesirable at this stage to consider.

I would only add, in conclusion, that although the circumstances of this case may look in themselves trivial, the principle underlying any question of this kind as to the responsibility of the employers for the action of their servant is in its application very important with regard to the comfort and security of the travelling public, and in the present case it does appear to me that there was no sufficient ground for refusing to allow this case to be tried in the ordinary way.

VISCOUNT CAVE. My Lords, I agree that this appeal should be allowed. The Court of Session has dealt with the matter upon the footing that the pursuer, having averred that the conductor exceeded the power conferred by the byelaw, has thereby in effect averred that he acted outside the scope of his authority, and so has pled himself out of Court. With the greatest respect for the learned judges who came to that conclusion, I do not think that this is the effect of the pleading. The object of the byelaw was not to determine the scope of the conductor's duties as between himself and his employers, but to give a limited power of arrest to the Corporation exercisable through its servants. In substance the pursuer's averment is that the conductor, acting in the course of and within the general scope of his employment, improperly exceeded the power conferred by the regulations upon his employers; and if this is made out the employers may be liable.

I think the pursuer should have an opportunity of proving his case.

LORD DUNEDIN. My Lords, I regret that I cannot agree with the decision of the First Division, which proceeds, I think, on too narrow a view of the effect of the pursuer's averments. I do not conceive that there can be any doubt as to the general law which, while I was at the Bar, was always held as settled by the cases of *Goff* v. *Great Northern Ry. Co.* (1)

(1) 3 E. & E. 672.

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION. Lord Dunedin.

and *Moore* v. *Metropolitan Ry. Co.* (1), which I always understood were good authorities in Scots law; and if any doubt remained as to that subject it was certainly set at rest by the decision of the First Division in *Lundie* v. *MacBrayne* (2), where Lord Kinnear based his judgment on what had been laid down in *Moore's Case.* (1)

The matter, I think, is very shortly put in a single sentence by Lord Kinnear in that case. He says, speaking of what is necessary to make a company liable: "First, the offence must be one for which, if it had been committed, the company had power to arrest, because it is not to be presumed that the company have authorised one of their servants to apprehend a person whom they themselves had no power to apprehend; and, secondly, that the officer was acting within the scope of his authority." This case has been decided upon the view that the power of arrestment being confined to cases where the officials are ignorant of the pursuer's name and address, the pursuer had averred himself out of Court by saying that they knew.

My Lords, upon the question of what the averment meant I have nothing to add to what has just been said by the noble and learned Viscount, Lord Finlay, opposite me, but, for myself, I do not think the case ought to be disposed of entirely upon the construction of the averment. I think that it is not possible for the defenders to reduce the pursuer to a dilemma of the kind they have sought to do here. If the officials are genuinely purporting to act under the authority of the byelaw, then if they make a mistake either of fact or of law which leads them to arrest wrongously, that is to say, in a way the byelaw does not allow, I think the Corporation are liable.

I cannot help feeling that the attention of the First Division was not sufficiently called to *Lundie* v. *MacBrayne* (2), for if in the present case they have not absolutely overruled that case (which indeed they were powerless to do, it being a decision of their own Division) they have at least gone completely counter to it. In *Lundie's Case* (2) the matter stood

(1) L. R. 8 Q. B. 36. (2) 21 R. 1085, 1089, 1090.

upon the Merchant Shipping Act. In that case there was first a clause that "any person who travels or attempts to travel . . . . without having previously paid his fare" commits an offence; that is, just as here, tries to evade payment; and then the arresting section proceeds: "It shall be lawful for the master or other officer" (and so on) "to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this Act, and whose name and address are unknown to such officer." So that you have precisely the same condition of the power of arrest being limited to where the name was not known. And I notice that Lord M'Laren in his judgment says this: "This is not a case of a crime at common law, but an alleged contravention of a statute, and we must look at the statute to see the right of the person against whom the contravention has been committed. It is only where the address of the person alleged to have contravened the statute is unknown that his apprehension is authorized, and I think the pursuer is entitled to an issue of wrongful apprehension, because he avers that he, being a law-abiding citizen whose address was known to the officers of the steamer, was given into the custody of a police officer by the defender's servant." Accordingly, precisely the same argument which prevailed in the First Division here was absolutely available in that case. I cannot think that that case can have been properly brought to the notice of the learned judges.

As to the form of the issue, I notice that both in Lundie's case and in *Wood* v. *North British Ry. Co.* (1), which was a case where a policeman had taken up a person who was committing a breach of the peace in the Waverley Station, the question of being within the scope of authority was put in the issue. The issue was "taken into custody . . . . by Walter Wilson and Thomas Hulse while acting in the course of their employment"; and it is the same thing in *MacBrayne's Case.*

I should have proposed an alteration in the issue here as

(1) (1899) 1 F. 562.

H. L. (Sc.) 1922 PERCY v. GLASGOW CORPORATION. Lord Dunedin.

settled by the Lord Ordinary, where there are no such words, had it not been for this, that there is not a denial by the Corporation that these officials were acting as officials in the course of their duty; on the contrary, the defences of the Corporation entirely approve of what the officials did, taking a different view, of course, of the facts from what the pursuer has said. They said the officials acted quite rightly. I think therefore there is no need to interfere with the issue as allowed by the Lord Ordinary.

LORD WRENBURY. I am of the same opinion, and for the reasons already assigned by your Lordships.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Inner House of the Court of Session, and also the costs of the appeal to this House, the last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, May 26, 1922.

Agent for the appellant: *D. Graham Pole, for W. G. Leechman & Co., Solicitors, Glasgow and Edinburgh.*

Agents for the respondents: *Martin & Co., for Sir John Lindsay, Town Clerk, Glasgow, and Simpson & Marwick, W.S., Edinburgh.*

[PRIVY COUNCIL.]

SISTERS OF CHARITY OF ROCKINGHAM . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

J. C.*
1922
June 29.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Expropriation of Land—Compensation—Injurious Affection of Owner's other Lands—Lands held together—Shunting Yard—Basis of Compensation—Anticipated Legal Use—Exchequer Court (R. S. Can., 1906, c. 140), s. 20—Expropriation Act (R. S. Can., 1906, c. 143), ss. 22, 26, 27.

The appellants owned land in Nova Scotia immediately on the west side of a public road and a Dominion railway, and had thereon a school; on the east side they owned two small promontories of land on the margin of a public harbour. They had made on the promontories a bathing house and wharf, both of which they used in connection with the school, but no legal right of way across the railway was proved. The Crown took the two promontories under the Expropriation Act (R. S. Can., 1906, c. 146), s. 8, for a public purpose, and upon an area wholly to the east of the railway, and including the two small promontories, made a large railway shunting yard. A claim by the appellants to compensation for the damage to their property on the west of the railway by reason of the construction of the shunting yard had been rejected by the Exchequer Court.

The Exchequer Court Act (R. S. Can., 1906, c. 104), s. 20, gives to that Court exclusive jurisdiction in claims against the Crown, either for property taken for any public purposes or for damage to property "injuriously affected by the construction of any public work"; the words quoted also appear in ss. 22, 26 and 27 of the Expropriation Act:—

Held, that the possession and control of the two promontories gave an enhanced value to the appellants' land on the west side of the railway, and that in respect of depreciation in value of those lands due to the anticipated legal use of works which might be constructed upon the two promontories, the appellants were owners whose lands had been injuriously affected, and that accordingly they were entitled to compensation; further, that the Exchequer Court in assessing the compensation should have regard to the anticipated use of the promontories as part of a shunting yard, not to the actual use at the time of the assessment.

Cowper Essex v. *Acton Local Board* (1889) 14 App. Cas. 153 followed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (November 2, 1920) affirming, subject to

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

J. C. 1922

SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

a slight variation, a judgment of the Exchequer Court (March 7, 1919).

The appellants, by petition of right in the Exchequer Court of Canada, claimed to recover compensation in respect of their land situate on the margin of Bedford Basin at Rockingham in Nova Scotia, upon an expropriation for public purposes under the Expropriation Act (R. S. Can., 1906, c. 143), and for damages to other lands alleged to have been held with, and to have been injuriously affected by the taking of, the expropriated area.

The appellants were a religious order incorporated by a statute of Nova Scotia, and had a large boarding school for girls situate close to the shore of Bedford Basin. The main school buildings, which were erected about 1872 at large expense, were upon land abutting on, and to the west of, a public road. Immediately to the east of, and parallel to, this road ran a line of railway, laid down in 1850 to 1854, which belonged to and was operated by the Dominion Government. Between the easterly limit of the railway line and the waters of the basin there was a narrow strip of beach, including two small promontories of land, containing about 220 square feet and 1220 square feet respectively, to which the appellants had acquired a prescriptive title. On the smaller of these promontories the appellants had made a bathing house, and on the larger a wharf and esplanade. The promontories were separated by land to which the appellants had no title. The water lots, being within the public harbour of Halifax, vested in the Dominion under the British North America Act, 1867. Since about 1873 the teachers and pupils at the school, and persons employed by the appellants, had habitually crossed and recrossed the railway to and from the bathing house and wharf, but it was found by the judgments in Canada that the appellants had no right of way.

The expropriated area comprised all the land lying to the east of the railway. After the expropriation the Government filled in so much of the harbour as was necessary for the construction of a shunting yard consisting of fourteen railway

tracks, including the double tracks which had been previously operated and continued to be operated as the main line. The shunting yard from point to point was about one mile in length, having its extreme breadth nearly opposite to the school; there was considerable traffic and movement of engines and railway cars carried on in the shunting yard.

The Expropriation Act (R. S. Can., 1906, c. 143) by s. 8 authorizes land being taken for the use of His Majesty upon deposit of a plan and description, the land thereupon vesting in His Majesty. By s. 22 "the compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property." Sects. 26 and 27 provide for proceedings by information by the Attorney-General in the Exchequer Court "in any case in which land or property is acquired, or taken for, or injuriously affected by the construction of any public work."

By the Exchequer Court Act (R. S. Can., 1906, c. 140), s. 20: "The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters: (*a*) every claim against the Crown for property taken for any public purpose; (*b*) every claim against the Crown for damage to property injuriously affected by the construction of any public work; . . . . . ."

The trial judge (Cassels J.) allowed the suppliants $7628, with interest from the date of the taking of the land; that sum being in respect of the value of the two promontories, and any riparian rights which the suppliants had in respect thereof, together with the value of the bathing house, wharf and esplanade. He held that the suppliants were not entitled to an easement or irrevocable licence to cross the railway to the promontories. The learned judge then dealt with the question whether the suppliants were entitled to compensation in respect of the injury caused to their property on the west side of the railway by the use of the shunting yard. He said: "The fourteen tracks used as a shunting yard are mainly on lands the property of the Crown. It is possible that one track may be over what is called these two knobs of land

J. C.
1922
SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

which I have described; but the injury which has been occasioned to the suppliants by reason of the placing and use of the shunting yard at the present location is an injury caused by the operation of the works on lands other than lands taken from the suppliants. Our Courts have followed the decisions of the English Courts under the Land Clauses Acts, and I think that I am bound by the English decisions." After considering those decisions he said, "Having regard to these authorities, I have reluctantly come to the conclusion that the suppliants are not entitled to claim the damages which will necessarily be occasioned by the use of the property partly in front of their building as a shunting yard."

The suppliants appealed to the Supreme Court. That Court (Davies C.J., Idington, Duff, Anglin, Brodeur and Mignault JJ.) dismissed the appeal, subject to the allowance of an additional $263 on an error of computation. The learned judges adopted the reasoning and conclusions of Cassels J.

1922. May 9, 11. *Upjohn K.C.* and *Hon. Geoffrey Lawrence* for the appellants. The principles of compensation established by the English decisions apply to cases in Canada arising under the Expropriation Act (R. S. Can., 1906, c. 143). Although *Paradis* v. *The Queen* (1) arose under s. 16 of the Government Railways Act, 1881, which is not in terms repeated in the Act of 1906, the same principles apply. The Expropriation Act, ss. 22, 26 and 27, and the Exchequer Court Act (R. S. Can., 1906, c. 140) all recognize a right of compensation for damage to property "injuriously affected by the construction of any public work," thus adopting the terms of s. 6 of the Railways Clauses Consolidation Act, 1845, and s. 68 of the Lands Clauses Consolidation Act, 1845. Even if no right of way was established between the lands of the appellants on the east and west of the railway, the appellants were in process of acquiring an indefeasible title under R. S. N. S., c. 167, s. 31, and were deprived of the right of doing so. They also enjoyed a right of access to the waters

(1) (1887) 1 Ex. Ct. Rep. 191.

of the harbour; that was a right of enjoyment in the land and was the subject of compensation: *Lyon* v. *Fishmongers' Co.* (1); *Duke of Buccleuch* v. *Metropolitan Board of Works* (2); *Attorney-General for Southern Nigeria* v. *John Holt & Co.* (3) But in any case the appellants were entitled to compensation for the damage to their property on the west side of the railway by the construction of the shunting yard upon their expropriated property on the east side: *Duke of Buccleuch's Case* (2); *Cowper Essex* v. *Acton Local Board.* (4) There was a unity of possession and control of the lands, so as to make applicable the principles there laid down; the two promontories, with the bathing house and wharf upon them, gave an enhanced value to the appellants' land on the west side of the railway. It is well established by the cases cited that the decision in *Hammersmith Ry. Co.* v. *Brand* (5) does not apply where compensation is claimed in respect of lands belonging to the person who also owned the expropriated land. The Courts in Canada erroneously treated the lay-out of the shunting yard existing at the date of the hearing as the basis of compensation, instead of having regard to the anticipated user of the land.

Their Lordships intimated that they did not require to hear arguments on the right of compensation for the alleged easement and right of access to the harbour.

MacKinnon K.C. and *T. Mathew* for the respondents. The English authorities cannot be applied to cases arising under the Expropriation Act. There are no provisions in that Act corresponding with ss. 49 and 63 of the Lands Clauses Act by which the right to compensation for severance of lands is given. *Paradis* v. *The Queen* (6) arose under s. 16 of the Government Railways Act, 1881, which gave a right to compensation for damage "by anything done under authority of" that Act. The effect of the provisions of the Expropriation Act dealing with compensation is to confine the right to damage done by the construction of the works, as distinct

(1) (1876) 1 App. Cas. 662.
(2) (1872) L. R. 5 H. L. 418, 445.
(3) [1915] A. C. 599, 621.
(4) 14 App. Cas. 153.
(5) (1869) L. R. 4 H. L. 171.
(6) 1 Ex. Ct. Rep. 191.

J. C. 1922

SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

from the user of them. The decision in *Hammersmith Ry. Co.* v. *Brand* (1) is therefore applicable, and the English decisions relied on for the appellants do not apply. After the decision of the Supreme Court in *Vézina* v. *The Queen* (2) the Legislature deliberately altered the language of the Act giving compensation.

Upjohn K.C. in reply. Sects. 22, 26 and 27 of the Expropriation Act as appearing in the revised statutes for 1906 merely reproduce sections of the Expropriation Act, 1889 (52 Vict. c. 13). The Exchequer Court gave to the provisions of the Act of 1889 the effect now contended for in *Robinson* v. *The Queen* (3); *Reg.* v. *Moss* (4); and *Magee* v. *The Queen* (5); that view must therefore be treated as having legislative sanction.

June 29. The judgment of their Lordships was delivered by

LORD PARMOOR. This appeal raises an important point as to the right of the appellants to claim compensation on the ground that a portion of their property, which has not been taken for the construction of public works, has been "injuriously affected" by the construction of a railway shunting yard, which in part extends over lands which have been taken from them under statutory powers.

The material facts may be shortly stated. The property of the appellants, prior to the expropriation of any part thereof, on March 7, 1913, by the Minister of Railways and Canals for the Dominion, consisted of lands situated on the east and west side of a public road which had been in existence from time immemorial, and of a railway which was originally constructed from 1850 to 1854. The lands expropriated were situated entirely on the east side of the railway, in and on the margin of Bedford Basin, which constituted part of the public harbour of Halifax. These lands consisted of two small promontories. The appellants have been paid the value of the lands taken, and have been compensated for all

(1) (1869) L. R. 4 H. L. 171.
(2) (1889) 17 Can. S. C. R. 1.
(3) (1895) 4 Ex. Ct. Rep. 439.
(4) (1895) 5 Ex. Ct. Rep. 30.
(5) (1897) 5 Ex. Ct. Rep. 391.

consequential damage, other than damage to their lands on the west side of the railway. These are the lands which are alleged to have been "injuriously affected," but the claim of the appellants has been disallowed both in the Exchequer Court and in the Supreme Court of Canada. Considerable buildings have been erected on the lands on the west side of the railway for educational and charitable objects by the appellants, who are a religious order incorporated by an Act of Parliament of Nova Scotia. It is not necessary, however, to describe these buildings in any detail. Their size and cost are not material to the only question before their Lordships, which is whether the appellants have a right to make any claim for compensation beyond that already allowed.

In the Courts below, and in their petition of right, the appellants further based their claim to compensation partly on a right of way, which they alleged to exist over the railway between their property situated on the east side of the railway and that situated on the west side. Their Lordships give no opinion whether such a right could be established across the railway, and all documents which might have proved the conditions, which existed when the railway was made, have been lost. In the opinion of their Lordships there was no evidence of sufficient adverse user, and no ground for disturbing the findings on this point in the Courts below. So far as the claim for compensation has been based on the existence of this right, it cannot be maintained, and in the further consideration of the case it will be assumed that no such right exists, and that the lands on the east and west side of the railway are severed by the railway track. The appellants further claimed that although the harbour of Halifax, of which Bedford Basin is a part, is a public harbour, within the meaning of the schedule of the British North America Act, 1867, yet that the appellants having constructed, on a portion of the bed of the harbour, a wharf and an esplanade, at which goods and provisions were landed for the use of the school, with the assent and licence of the Crown, such assent and licence had under the circumstances become irrevocable,

J. C. 1922 SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

and that they were entitled for the purposes of compensation to regard the bed of the harbour underlying the wharf and esplanade as their property. This claim, however, does not appear to have been pressed at the hearing in the Exchequer Court, and during the hearing of the appeal their Lordships intimated that it could not be maintained.

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute. The learned judge, in the Exchequer Court, states that the Canadian Courts have followed the decisions in the English Courts under the Lands Clauses Acts, and that he thinks that he is bound by the English decisions. This statement of the learned judge was not questioned in the Supreme Court of Canada, or at the hearing before their Lordships. In the case of *Holditch* v. *Canadian Northern Ontario Ry. Co.* (1) it is clear that the decision of their Lordships was based on the principle of English decisions, and that there was a special reference to the case of *Cowper Essex* v. *Acton Local Board.* (2) Their Lordships have applied the English decisions, so far as they are applicable, in the construction of the Canadian statute.

The Exchequer Court Act (R. S. Can., 1906, c. 140) by s. 20 gives exclusive jurisdiction to the Exchequer Court to hear and determine every claim against the Crown, either for property taken for any public purpose or for damage to property "injuriously affected by the construction of any public work." The words "injuriously affected by the construction of any public work" are to be found in ss. 22, 26 and 27 of the Expropriation Act (R. S. Can., 1906, c. 143). In s. 15 of the latter Act the words are "damages occasioned by the construction of any public work," but this section is not applicable to the circumstances of the present appeal, its object being

(1) [1916] 1 A. C. 536. (2) 14 App. Cas. 153.

to authorize agreements between a claimant and the Minister. There are sections in the English Railways Clauses and Lands Clauses Acts which do not appear in the Canadian Act, but the words "injuriously affected by the construction of any public work" are to be found in s. 6 of the Railways Clauses Consolidation Act, 1845, and substantially similar words are to be found in s. 68 of the Lands Clauses Act, 1845. Sect. 6 of the Railways Act enacts that the company shall make to the owners, etc., interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, etc., by reason of the exercise as regards such lands, of statutory powers vested in the company. The latter portion of this section is not to be found in the Canadian statute.

Sect. 68 of the Lands Clauses Act begins, "If any party shall be entitled to any compensation in respect of lands or of any interest therein which shall have been taken for or injuriously affected by the execution of the works." There is some doubt on the English decisions whether s. 68 alone would give a right to compensation for the injurious affection of lands by the execution of public works, or whether that section should be regarded as a procedure section, but this distinction is not of importance in considering the Canadian statute. Lord Chelmsford in *Ricket* v. *Metropolitan Ry. Co.* (1), after referring to s. 68 of the Lands Clauses Act, and s. 6 of the Railways Clauses Act, says: "There appears to me, however, to be no substantial difference between the language of s. 68 of the former Act and s. 6 of the latter Act." The real questions, however, to be determined in the present appeal are whether under the special circumstances of the case the appellants can maintain a claim for damage to their property on the west side of the railway, on the ground that it has been injuriously affected by the construction of a public work over the two promontories, and, if so, what is the principle to be applied

(1) (1867) L. R. 2 H. L. 175, 189.

J. C. 1922

SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

in assessing the amount. The actual amount, if any, is for the decision of the Exchequer Court, and cannot be raised before their Lordships.

If the railway shunting yard, of which complaint has been made, had been constructed on land, no part of which had been expropriated from the appellants, the appellants would not have been entitled to claim compensation, although, in fact, such construction had seriously depreciated the value of their property on the west side of the railway. Where no land of the same owner has been taken, the words "injuriously affected" only include damage or loss which would have been actionable but for statutory powers, and such damage or loss must be occasioned by the construction of the authorized works, as distinct from their user. These limitations were adopted in a series of early English cases, and confirmed in the House of Lords in the case of *Hammersmith Ry. Co.* v. *Brand.* (1) Lord Cairns dissented from this interpretation of the statutory right to compensation, but the decision in that case states the principle to be applied in English law. It is authoritative, and cannot be altered without fresh legislation. If, therefore, the land taken for the shunting yard had belonged wholly to some owner other than the appellants, the appellants could not have claimed compensation on the ground that their property on the east side of the railway had been "injuriously affected"; but part of the land so taken was the property of the appellants, and it is on this ground that the appellants base their claim to compensation.

The first of the reported English decisions which deals with the question of injuriously affecting lands by the construction of public works, where the mischief of which complaint is made is caused by what is done on lands taken from the same owner, is *In re Stockport, Timperley and Altringham Ry. Co.* (2) That decision has been considered in a number of subsequent cases. For a time it gave rise to considerable difference of judicial opinion, but the law as applied by Crompton J. has been twice considered, and approved in

(1) L. R. 4 H. L. 171. (2) (1864) 33 L. J. (Q. B.) 251.

the House of Lords : *Duke of Buccleuch* v. *Metropolitan Board of Works* (1); *Cowper Essex* v. *Acton Local Board.* (2) In the *Stockport Case* (3) a company had taken land, the property of L., and proposed to make their railway so close to a cotton mill belonging to him, that, by reason of the proximity of the railway, and the danger of fire from trains using the line, the building could only be insured at an increased premium, and was rendered of less saleable value. Crompton J. stated the principle as follows : " Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the company have a right to say, ' We had done what we had a right to do as proprietors, and do not require the protection of any Act of Parliament ; we, therefore, have not injured you by virtue of the provisions of the Act ; no cause of action has been taken away from you by the Act.' Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, ' It is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage ; without the Act of Parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question.' " (4)

The rule to which Crompton J. refers is that an owner is not entitled to compensation, except for matters which, but for statutory powers, would have given a right to action, and he brings the case before him within this rule. In assessing the amount of compensation due to an owner of lands for damage, caused by the construction of works on other land taken from him, Crompton J. justified the inclusion of mischief which arises both in the making and using of the railway, on the ground that but for the Act of Parliament both the making and the using of the railway would have been illegal,

(1) L. R. 5 H. L. 418.
(2) 14 App. Cas. 153.
(3) 33 L. J. (Q. B.) 251.
(4) Ibid 253.

J. C.
1922
SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

and that he was only applying the general principle already established to the circumstances of the case before him.

The principle stated by Crompton J. in the *Stockport Case* (1) was considered in *Duke of Buccleuch* v. *Metropolitan Board of Works* (2), and a distinction was drawn between that case and the cases of the *Hammersmith Ry. Co.* v. *Brand* (3), and *City of Glasgow Union Ry. Co.* v. *Hunter*. (4) Lord Chelmsford, referring to these cases, said: "In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains."

If that decision is applied to the circumstances of the present appeal, it would, in the opinion of their Lordships, sanction a claim to compensation for the probable or apprehended use of the two promontories as part of a railway shunting yard. No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shown to arise from the apprehended legal use of the lands taken from them.

The subsequent case of *Cowper Essex* v. *Acton Local Board* (5) cannot be differentiated from the case under appeal. It accepts the decision of Crompton J. as an accurate exposition of English compensation law. When that case was before the Court of Appeal, it was held that the intervention of a railway, which was wholly the property of the railway company

(1) 33 L. J. (Q. B.) 251, 253.
(2) L. R. 5 H. L. 418, 458.
(3) L. R. 4 H. L. 171.
(4) (1870) L. R. 2 H. L. Sc. 78.
(5) 14 App. Cas. 153.

and in which the claimant seeking compensation had no interest, made a valid distinction from the *Stockport Case* (1), and that that case ought not to be extended. The Master of the Rolls further expressed an opinion that the *Stockport Case* (1) was in itself wholly wrong. When the case came before the House of Lords, the principle of the *Stockport Case* (1) was confirmed and approved, Lord Macnaghten saying that, in his opinion, it had stood the test of criticism, that in practice he believed it had always been followed, and that it was perfectly right. As in the present case, the land taken was separated from the lands alleged to be injuriously affected by a railway, and there is no evidence that there was any right of way over the railway between the lands of the same owner on either side. It was held, however, to be sufficient that the lands taken and the lands alleged to be injuriously affected, were held by the same owner under such conditions that the unity of ownership conduced to the advantage of the property being comprised in one holding. Lord Watson, after referring to previous cases, said: "It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers." (2) In a further passage Lord Watson says: "I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act, so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation." (3)

In the same case the Lord Chancellor says that where the future use of the part of a proprietor's land taken from him may damage the remainder, then such damage may be

(1) 33 L. J. (Q. B.) 251. (2) 14 App. Cas. 153, 166.
(3) Ibid. 167.

J. C. 1922

SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

injuriously affecting the proprietor's other lands, though it would not be injurious affection of the land of neighbouring proprietors, from whom nothing has been taken for the purpose of the intended works.

Applying then the principle of this decision to the case under appeal, it is clear that the possession and control of the two promontories did give an enhanced value to the land of the same owners on the west side of the railway, and that so far as the depreciation of the value of the lands on the west side of the railway is due to the anticipated legal use of works which may be constructed over the two promontories, the appellants are in the position of owners whose land has been injuriously affected by the construction of public works. It appears that before the hearing of the case the railway shunting yard had been laid out, and that the actual use of the land comprised in the two promontories was inconsiderable. In the opinion of their Lordships, however, actual user at the time when the compensation case is heard is not the basis on which the amount of compensation should be assessed. It may be that at the time when the compensation case is heard no works have been constructed, and in any case the appellants are entitled to claim compensation, which must be claimed once for all, for depreciation in the value of their lands on the west side of the railway, in so far as such depreciation is due to the anticipated legal use of authorized works which may be constructed upon the two promontories. The limitation of the amount of compensation to the anticipated construction of authorized works upon lands actually taken from the appellants has a special importance in a case like the present, where the shunting yard has been largely laid out on land which has not been taken from the appellants, and which has never been part of their property. This limitation, which is plainly expressed in all the leading English decisions, is again restated in *Horton* v. *Colwyn Bay Urban Council* (1), in which it was held that as the acts of user, the contemplation of which caused the depreciation, would be done on lands not the

(1) [1908] 1 K. B. 327.

property of the claimant, the claimant was not entitled to any compensation.

The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard.

It is not possible on the information available before their Lordships to give further assistance on the assessment of the amount of compensation due to the appellants.

Their Lordships will humbly advise His Majesty that the judgments of the Exchequer Court and the Supreme Court of Canada should be reversed, and that the case be remitted to the Exchequer Court, and that the costs of this appeal and in the Courts below be paid by the respondent.

Solicitors for appellants: *Linklaters & Paines.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1922 July 13.

MACEDO AND OTHERS . . . . . APPELLANTS;

AND

BEATRICE STROUD . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Gift of Land—Deed delivered to third Person—Absence of Registration of Instrument—Imperfect Gift—Invalidity in Equity—Real Property Ordinance (No. 60 Consolidated Laws of Trinidad), s. 46.

The owner of mortgaged lands and houses in Trinidad, about three months before his death, executed a conveyance and a memorandum of transfer by each of which he purported to convey or transfer certain properties absolutely to his daughter in consideration of his affection for her. The properties dealt with by the memorandum, unlike those dealt with by the conveyance, were registered under the Real Property Ordinance No. 60 of Trinidad, and accordingly, by s. 46, no transfer of them was effectual to pass any estate or interest unless the instrument was registered under the Ordinance. The donor after having executed the two instruments delivered them to his solicitor, telling him to keep, and not to register, them. They remained in the solicitor's custody unregistered until the death of the donor, who during his life continued to receive the rents. There were concurrent findings that the instruments were intended to operate as immediate and unconditional gifts to the daughter:—

Held, (1.) that the deed of conveyance, though not delivered to the daughter, operated to convey to her the properties to which it referred; (2.) that the memorandum not having been registered under the Ordinance, nor delivered to the donee for that purpose, there was an imperfect gift of the properties with which it dealt to which equity could not give effect; and (3.) that the burden of the mortgage should be distributed between the two classes of property in proportion to their values at the date of the gift.

Judgment of the Supreme Court varied.

APPEAL from a judgment of the Supreme Court (April 8, 1921) dismissing an appeal from Deane J. of that Court.

The action was brought by the respondent against the two first appellants as executors and trustees of the will of J. J. Ribeiro, deceased; a third appellant, representing the beneficiaries, was joined as a defendant. By her statement of claim the respondent claimed possession of certain

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD PARMOOR, and LORD TREVETHIN.

properties in Trinidad under a conveyance and a memorandum of transfer from Ribeiro, both dated November 30, 1914, and an account. By their defence the appellants pleaded (inter alia) that if the conveyance and memorandum were executed by Ribeiro, they were not delivered by him and were of no effect; further, that if they were delivered, they were delivered as escrows upon conditions which were not fulfilled. The appellants, the executors, alleged that they had paid off a mortgage upon the properties and counterclaimed the sum so paid.

The facts appear from the judgment of the Judicial Committee.

The action was tried by Deane J., who found that Ribeiro conveyed the properties dealt with in both instruments absolutely and unconditionally, and without any intention to keep a control over them in the hands of the solicitor. With regard to the properties dealt with by the memorandum of transfer, he held that by reason of s. 46 and s. 100, sub-s. 1, of the Real Property Ordinance No. 60 the legal representatives of Ribeiro alone were entitled to be registered as proprietors, but that they would hold as trustees for the respondent, who was entitled to demand a transfer to herself. He also rejected the appellant's contention that the memorandum of transfer was invalid under s. 2 of the Real Property Amendment Ordinance No. 19 of 1913, in that it bore no certificate that it had been prepared by an authorized person. He held therefore that the respondent was entitled to recover possession of all the properties, subject to reimbursing to the executors the sums which they had paid, whether by way of principal or interest, in respect of the mortgage.

An appeal was heard by the Chief Justice (Sir A. Lucie-Smith) and Russell J. They concurred in the view of the trial judge that the intention of Ribeiro was to make an absolute gift of all the properties to the respondent. The Chief Justice, however, was of opinion that having regard to the provisions of the Ordinances, there was an imperfect gift of the properties dealt with by the memorandum, and

J. C.
1922
MACEDO
v.
BEATRICE
STROUD.

that that gift was invalid, since equity could not perfect it. Russell J. on that question agreed with the view of Deane J. In the result the appeal was dismissed.

By the Real Property Ordinance (No. 60 of the Consolidated Laws of Trinidad, 1902), s. 46: "No instrument until registered in manner hereinbefore prescribed shall be effectual to pass any estate or interest in any land under the provisions of this Ordinance. . . . ."

By the Real Property Amendment Ordinance (No. 19 of 1913), s. 13: "No instrument of transfer . . . . shall be registered by the Registrar-General under the provisions of the Real Property Ordinance (No. 60) unless it bears the signature of some barrister, or of some solicitor and conveyancer, as having prepared such instrument. . . . ."

The property dealt with by the conveyance—namely, that not registered under Ordinance No. 60, was transferable by deed, and by s. 13 of Registration of Deeds Ordinance (No. 57) deeds require only signature and delivery, not sealing.

1922. June 19, 20. *Sir John Simon K.C.* and *Bowstead* for the appellant. There was no valid gift of any of the properties. As to those properties which were registered under Ordinance No. 60, even if there was an intention to make a gift, the gift was imperfect in that the memorandum was not registered under s. 46. Equity will not perfect an imperfect gift: *Milroy* v. *Lord.* (1) There was no declaration of trust by Ribeiro. But there was not, as to any of the properties, an intention to make an unconditional and irrevocable gift. That intention is negatived by the following facts: (*a*) the documents were handed to the solicitor with instructions that he was to keep them, and that he was not to register; (*b*) Ribeiro retained possession and control of the title deeds, and received the rents, also part of the purchase price of one of the properties which he had previously sold; (*c*) he did not communicate the fact of the gift to the respondent. There was, therefore, no valid gift: *Richards* v. *Delbridge* (2); *Searle* v. *Law.* (3)

(1) (1862) 4 D. F. & J. 264, 274. (2) (1874) L. R. 18 Eq. 11.
(3) (1846) 15 Sim. 95.

Upjohn K.C. and *J. K. Young* for the respondents. The instruments were in form immediate and unconditional assurances to the respondents, and upon delivery to the solicitor operated to transfer the properties to her, unless the local Ordinances prevented that effect as to the memorandum : *Doe* v. *Knight* (1) ; *Xenos* v. *Wickham.* (2) In the former of those cases the facts were very similar to those here. The respondent could have required the solicitor to hand the instruments to her. The Ordinances raise no difficulty in equity. The memorandum conferred upon the respondent the equitable right to have the properties transferred to her. That equitable right is not affected by s. 46 of Ordinance No. 60 ; nor by Ordinance 19 of 1913. The respondent had that right in equity even as a volunteer. But she was in the position of a purchaser, since she came under two obligations—namely, (*a*) to discharge the mortgage, and (*b*) to indemnify the purchaser of one of the properties : *Price* v. *Jenkins.* (3) There have been conflicting decisions in Australia and New Zealand as to the force of equitable rights in property subject to the Torrens system of registration : *Anning* v. *Anning* (4) ; *In re Tanner* (5) ; *Tierney* v. *Halfpenny* (6) ; *In re Skinner* (7) ; Hogg's Australian Torrens System (1905), pp. 788 to 791. The decision of the Board in *Howard* v. *Miller* (8) does not touch the present question.

Bowstead replied.

July 13. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Trinidad and Tobago which affirmed, the Chief Justice in part dissenting, a decision of Deane J. that the respondent was entitled to recover possession of land and houses in Port of Spain. These she had claimed as validly given to her by one Ribeiro deceased, whose natural daughter she was. He was a merchant of considerable wealth, who had several natural children : the respondent,

(1) (1826) 5 B. & C. 671, 687, 692.
(2) (1866) L. R. 2 H. L. 296, 312.
(3) (1877) 5 Ch. D. 619.
(4) (1907) 4 C. L. R. 1049.
(5) (1886) 5 N. Z. L. R. 102.
(6) (1883) 9 Vict. L. R. 152.
(7) (1894) 6 Qd. L. J. 68.
(8) [1915] A. C. 318.

J. C. 1922 MACEDO v. BEATRICE STROUD.

three children by a Mrs. Neverson, and another daughter, Isabella de Cabral, who is an appellant. Ribeiro died on February 3, 1915. By his will, which was dated September 26, 1911, he appointed his nephew, the appellant Macedo, and one Vasconcellos, who predeceased the testator, his executors and trustees. The appellant, de Freitas, was appointed by the Court a trustee in addition to Macedo. The testator by the will gave pecuniary legacies of considerable amounts, including $15,000 to the respondent, whom he referred to as "my daughter Beatrice," a legacy of $45,000 for the benefit of his three children by Mrs. Neverson, and $50,000 to his nephew, the appellant Macedo. The residue he bequeathed as to half in trust for the appellant Isabella de Cabral and her issue, and as to half in trust for his sisters and their issue.

About the beginning of November, 1914, one Siegert was the owner of the land and houses to which the question in this appeal relates. All of these were of freehold tenure excepting one, which was leasehold. They were subject to a mortgage for $40,000 and interest. Siegert was indebted to Ribeiro and had agreed, about the beginning of November, 1914, to sell the land and houses to him for $20,000 subject to the mortgage. By Ribeiro's direction Siegert gave notice on November 13 for payment off of the mortgage, and on the next day the property was conveyed by him to Ribeiro subject to the mortgage. Most of the property was governed, as regarded the mode of conveyance, by the general law under which freehold and leasehold property is assured in Trinidad by deed, like land in England, although in Trinidad such deeds require only signature and delivery but not sealing. Registration under the local ordinance is not required in the case of such property so far as concerns the validity of the deed, although non-registration may postpone title to that conferred by a registered assurance. But certain parts of the property, including a house known as 37, Dundonald Street, were held upon titles registered under the local Real Property Ordinance No. 60, and amending ordinances. These ordinances provide as to land

subject to them that no transfer is to be effectual to pass any estate or interest in land with a registered title, unless the transfer is registered in accordance with the ordinances, and the title of the registered proprietor as appearing on the register is to be conclusive. The amending Ordinance 19 of 1913 further provides that no instrument of transfer of land in the Colony is to be registered unless it bears the signature of some barrister or solicitor or conveyancer as having prepared the instrument.

Shortly before Ribeiro bought the property from Siegert the appellant de Freitas asked the former to sell to him 37, Dundonald Street, and he agreed to do so. When Ribeiro had made the purchase from Siegert, de Freitas paid to him $3000 on account of the purchase-money, which amounted to $9600, and entered into possession. The balance of $6000 was paid after Ribeiro's death. A few days after Siegert had conveyed to Ribeiro, in November, 1914, the latter gave instructions to his solicitor, Iles, that he desired to give the property bought from Siegert to the respondent. He accordingly prepared a conveyance by Ribeiro to the respondent of so much of the property as was not held under registered titles, and a separate memorandum of transfer to her of so much as was held under registration, and handed them to Ribeiro. Iles was not informed of the sale to de Freitas of 37, Dundonald Street, which was part of the registered property, and this part of the property was included in the memorandum. The two documents were executed by Ribeiro at his own house. The evidence of George, Iles's clerk, is that he and Iles went there, and that Ribeiro executed the transfer and the memorandum in George's presence as attesting witness. Ribeiro told Iles to keep them and not to register them. George then took them away to Iles' office, where they were kept. These are the facts as found in concurrent findings by all the judges in the Courts below. Iles said that Ribeiro added certain directions which imported that Iles was to keep the documents within his control with a view to their alteration or recall. This testimony by Iles was unanimously rejected in the Courts below, and the

J. C. 1922 MACEDO v. BEATRICE STROUD.

account given by George, to the effect above stated, was accepted. The conveyance of the unregistered property proceeds on the recital that in consideration of the love and affection which Ribeiro bore for the respondent he as settlor conveyed and assigned to her the freehold and leasehold property absolutely, subject only to the mortgage then subsisting on it for what was said to be $60,000 and interest. It bears to be signed and delivered by Ribeiro. The memorandum of transfer is in an analogous form, but, probably because this was unnecessary, contains nothing about delivery. There is no signature, as required by the Ordinance of 1913, of the person who had prepared it, but it is not on this ground that their Lordships proceed.

It is clear from the evidence that the respondent had for several years lived in Ribeiro's house, of which she took charge for some time before his death. He had been in ill-health, and she took care of him as a daughter might take care of her father. Ribeiro lived for only about two months after executing the documents. During that period he paid certain rates which had become due in respect of the property and received the rents and profits.

On consideration of the evidence and of the concurrent findings of the Courts below, their Lordships think that the deed of transfer of the unregistered property must be held to have been duly and completely executed by Ribeiro, and the memorandum relating to the registered property to have also been duly and sufficiently signed by him. The reason why he did not wish to hand the documents over to the respondent may have been that he wished to make corresponding alterations in his testamentary dispositions. This is not improbable, but there are no materials which afford reliable evidence on the point. In any view, Iles's evidence being rejected, there is nothing shown to justify the contention that the two documents were nullities or of no effect. There arise, however, in connection with them, important questions of law. Deane J. in the appellate Court and Russell J. held that both documents were operative to confer title on the respondent. The Chief Justice, in the appellate

Court, dissented from this as regards the memorandum relating to the registered property. He considered it, unlike the conveyance, to constitute only an imperfect voluntary gift, which a Court of equity had no jurisdiction to enforce.

Their Lordships entertain no doubt that the conveyance of the unregistered property was a deed which was duly delivered. As was said by Blackburn J. in *Xenos* v. *Wickham* (1) no particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery : " but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it ; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it." He goes on to point out that the grantor may deliver to his own servant, if the grantor makes delivery, intending to make the deed his own deed.

That a deed may be validly executed, even though it remains in the custody of the person who made it or his agent, appears from what was laid down in *Doe* v. *Knight*. (2) It is no doubt true that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only. But in the present case there was no event or condition specified to qualify the delivery which Ribeiro is said in the attestation clause to have made, and which the Courts below have found that he made. As it is not possible to contend successfully that the conveyance was a nullity, it must be taken to have operated completely to transfer the title to the respondent.

The memorandum of transfer, however, stands on a different footing. It was never made the subject of registration, nor

(1) L. R. 2 H. L. 296, 312. (2) 5 B. & C. 671.

J. C. 1922 MACEDO v. BEATRICE STROUD.

did Ribeiro present it, or hand it to the transferee, for that purpose. It therefore, having regard to the terms of the ordinance, transferred no estate or interest either at law or in equity. At the most it amounted to an incomplete instrument which was not binding for want of consideration. Had it been in terms a declaration of trust, a Court of equity might have compelled the trustee to carry out the trust, which would have been binding on him, even if voluntary. But it does not purport to be a declaration of trust, or anything else than an inchoate transfer. As such, and as it is voluntary, their Lordships think that it is no more than an imperfect gift of which a Court of equity will not compel perfection. The judgments of Lord Eldon in *Ellison* v. *Ellison* (1), and of Turner L.J. in *Milroy* v. *Lord* (2), have placed this principle beyond question. Their Lordships are therefore of opinion that the respondent was not entitled to succeed on her claim to the registered property. They are at one with the view of the Chief Justice, who, agreeing with the other learned judges about the validity of her title to the unregistered property, himself thought that she must fail on this branch of her case.

In the result their Lordships will humbly advise his Majesty that the appeal should be dismissed as to the unregistered property, but should succeed as to that which was registered, and that as to this, judgment dismissing the plaintiff's claim should be given for the appellants. The burden of the mortgage which affected both properties will be distributed, in proportion to their values at the date of the gift. The question of costs gives rise to some complication; but their Lordships consider that under the circumstances and as the difficulties have arisen out of the arrangements made by Ribeiro himself, justice will be done if the orders as to costs in the Courts below are left undisturbed and no costs of this appeal are given.

Solicitors for appellants: *Rehder & Higgs.*
Solicitors for respondent: *Druces & Attlee.*

(1) (1802) 6 Ves. 656. (2) 4 D. F. & J. 264.

[HOUSE OF LORDS.]

H. L. (E.)*
1922
June 27.

COMMITTEE FOR PRIVILEGES.

VISCOUNTESS RHONDDA'S CLAIM.

Parliament—House of Lords—Peeress in own Right—Claim to sit and vote—Sex Disqualification (Removal) Act, 1919 (9 & 10 *Geo.* 5, *c.* 71), *s.* 1.

A peeress of the United Kingdom in her own right is not entitled by virtue of s. 1 of the Sex Disqualification (Removal) Act, 1919, to receive a writ of summons to Parliament :—

So *held* by the Committee for Privileges by a majority of 22 to 4.

In this case Margaret Haig Viscountess Rhondda, wife of Sir Humphrey Mackworth, Bart., a peeress of the United Kingdom in her own right, presented a petition praying that His Majesty might be pleased to order a writ of summons to Parliament to be issued to her.

The petition was referred to the Committee for Privileges and was originally heard on March 2, 1922. On that occasion, the then Attorney-General (Sir Gordon Hewart K.C.) offering no opposition, the Committee reported in favour of the claim, but on March 30, 1922, on the motion of the Lord Chancellor, the report was referred back to the Committee for reconsideration, and the case was set down for reargument on May 18.

By letters patent, dated June 19, 1918, the petitioner's father was created first Viscount Rhondda, with special remainder in default of male issue to the petitioner and the heirs male of her body, and the grant contained a clause granting to the first peer and his male issue and in default

* *Present :* Viscount Birkenhead L.C., Marquess of Crewe, Marquess of Lincolnshire, Earl of Derby, Earl of Malmesbury, Earl of Selborne, Earl of Ancaster, Viscount Hutchinson (Earl of Donoughmore) (Chairman), Viscount Peel, Viscount Haldane, Viscount Cave, Viscount Finlay, Viscount Chelmsford, Viscount Ullswater, Lord Wigan (Earl of Crawford and Balcarres), Lord Hylton, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Parmoor, Lord Wrenbury, Lord Buckmaster, Lord Muir Mackenzie, Lord Terrington, Lord Phillimore, Lord Askwith, Lord Chalmers, Lord Riddell and Lord Carson. [These are the peers present at the voting on May 19.]

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM.

of such issue the heirs male of the petitioner the right to have, hold, and possess a seat, place, and voice in the Parliaments and public assemblies and Councils of the King, his heirs and successors within the United Kingdom amongst other viscounts as viscounts of Parliaments and public assemblies and Councils.

The material portions of the letters patent are fully set out in the opinion of the Lord Chancellor.

On the death of the first Viscount in July, 1918, without having had any issue male, the petitioner succeeded to the title.

The petitioner based her claim to receive a writ of summons to Parliament in right of her said dignity upon s. 1 of the Sex Disqualification (Removal) Act, 1919, which provided that a person should not be disqualified by sex or marriage from the exercise of any public function or from being appointed to or holding any civil or judicial office or post.

May 18, 19. *Talbot K.C.* (with him *Greene K.C.*) for the petitioner. The question whether a peeress of the United Kingdom in her own right is, by virtue of the Sex Disqualification (Removal) Act, 1919, entitled to a writ of summons to attend Parliament depends upon the construction of the Act of Parliament. This is purely a question of law and is not a matter in which your Lordships have any discretion. The Committee, when dealing with a question of law, is in the same position as your Lordships when sitting as a tribunal of appeal. It follows that this statute must be construed according to well-ascertained principles of construction and, in particular, without any reference to the history of the Bill, which became the Act, when it was before either House of Parliament: *Earldom of Norfolk Peerage Claim.* (1) In the *Wensleydale Peerage Case* (2), where the Crown attempted to confer upon Lord Wensleydale a peerage for life carrying with it a right to sit in this House, it was proposed to summon the judges and put certain questions to them, but the motion was objected to on the ground that the

(1) [1907] A. C. 10, 12, 16. (2) (1856) 5 H. L. C. 958, 981.

only question involved was that of the right to sit and vote in the House, which was not a question of mere law, and that view was adopted. That has no application to the present case where the petitioner claims the right to sit and vote by Act of Parliament. In construing an Act of Parliament the language of the Act is alone to be considered and it is not permissible to refer to the votes of either House or to the speeches made in either House during the course of the passage of the Act through Parliament: *Millar* v. *Taylor* (1); *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (2); *Administrator-General of Bengal* v. *Prem Lal Mullick.* (3) In *Reg.* v. *Bishop of Oxford* (4), which dealt with a question of the construction of the Public Worship Regulation Act, 1874, a speech of the Lord Chancellor in introducing the Bill was admitted in evidence to show what was the construction of the Church Discipline Act, 1840, but it was never suggested that it was admissible for the purpose of construing the Act of 1874; and even that admission was stated by Lord Selborne in *South Eastern Ry. Co.* v. *Railway Commissioners* (5) to have been regretted in the House of Lords.

[He was relieved from further argument on this point at this stage of the proceedings.]

When the Act of 1919 was passed there were a great number of disqualifications affecting the female sex in connection with the administration of the public affairs of the country, and, amongst other things it had been established for many centuries that a woman was not qualified for a seat in this House: *Countess of Rutland's Case.* (6) In *Chorlton* v. *Lings* (7) Willes J. treats it as unquestionable that a peeress in her own right can neither sit herself in the House nor vote by proxy, and attributes the absence of such right to the respect due to women and to a sense of decorum and not to their want of intellect or unfitness to take part in the

(1) (1769) 4 Burr. 2303, 2332.
(2) [1892] A. C. 498, 501–2.
(3) (1895) L. R. 22 Ind. Ap. 107, 118.
(4) (1879) 4 Q. B. D. 525, 535.
(5) (1881) 50 L. J. (Q. B.) 201, 203.
(6) (1605) 6 Rep. 52*b*.
(7) (1868) L. R. 4 C. P. 374, 391, 392.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

government of the country. That is an illustration of the policy of the common law, following the policy of the Roman law, not to allow women to discharge public functions. It is laid down in general terms in Justinian's Digest: "Feminæ ab omnibus officiis civilibus vel publicis remotæ sunt." That being the law, subject to certain piecemeal exceptions introduced from time to time by special legislation, in 1919 there was passed an Act which on its face shows the clearest intention on the part of the Legislature to put an end to that doctrine and to place men and women, so far as concerns the public affairs of the country, on precisely the same footing.

The material words of this Act are clear and unambiguous: "A person shall not be disqualified by sex or marriage from the exercise of any public function." That is a plain expression of a general policy. Parliament is dealing generally with disqualifications on account of sex and is dealing with them by removing them. This view is supported by a reference both to the short title and to the formal title. By successive Acts of Parliament expressed in the same form of language as the present Act—i.e., referring to disqualification by sex or marriage—women had been admitted to every legislative body, superior or subordinate, in the country with the single exception of this House. Then in 1919 the state of public opinion had so far advanced that Parliament swept away the general disability of women. Why then should the function of sitting and voting in this House be the solitary exception to that general enactment—an exception which is directly contrary to the policy of the Act? The language of the Act is amply sufficient to include the right of sitting on a legislative body. It may be objected that it is inconceivable that Parliament should have intended to make so vital a change in the constitution of this House except by words expressly referring to the House, but the answer is that this is revolutionary legislation and that the general words are perfectly plain. The rule established by the authorities as to the construction of general words in an Act of Parliament is that they are to be construed according to their

literal signification, unless there is something either in the language of the Act itself or in the state of the law existing at the time when the Act was passed to show that Parliament by the use of those general words did not mean what the words prima facie signify: *Stradling* v. *Morgan* (1); *Beckford* v. *Wade* (2); *Duke of Newcastle* v. *Morris* (3); *Vacher & Sons* v. *London Society of Compositors.* (4)

[LORD ATKINSON. In construing the words of an Act of Parliament regard must be had to the subject matter with reference to which they are used and to the object of the Legislature: *Edinburgh Street Tramways Co.* v. *Torbain* (5), following upon *River Wear Commissioners* v. *Adamson.* (6)]

That is not contested, but a strained construction will not be put upon words that are otherwise clear merely because it may be thought improbable that the Legislature would have used them.

[As to the use of the word "function" in this connection in literature, counsel referred to Swift's Contests and Dissensions in Athens and Rome: Swift's Works (Walter Scott's edition), vol. iii., p. 309; Helps' Realmah, vol. iii., p. 43; Anson's Law and Custom of the Constitution, 1st ed., vol. i., p. 191.]

Nor does the fact that this Act, after the general words removing the disqualification of sex from the exercise of any public function, adds a number of specific cases to which the same principle applies prevent the general words from bearing their natural meaning. Where the Legislature states a number of specific cases, *a*, *b*, *c*, *d* and *e*, and then, with those specific cases in its mind, adds general words, the ejusdem generis rule is frequently applied by the Courts, but that rule has never been applied to a case where the general words come first. No doubt, if the petitioner's construction of the Act is correct, the continued existence on the statute book of s. 9, sub-s. 5, of the Representation of

(1) (1558) Plowd. 199, 204.
(2) (1805) 17 Ves. 87, 91.
(3) (1870) L. R. 4 H. L. 661, 674.
(4) [1913] A. C. 107, 117.
(5) (1877) 3 App. Cas. 58, 68, 69.
(6) (1877) 2 App. Cas. 743.

H. L. (E.) 1922 — VISCOUNTESS RHONDDA'S CLAIM.

the People Act, 1918, which provides that "any incapacity of a peer to vote at an election arising from the status of a peer shall not extend to peeresses in their own right" creates an anomaly. That enactment, though perfectly proper at the time at which it was passed, ought to have been repealed when Parliament passed the Sex Disqualification (Removal) Act, but the inadvertent omission to repeal that sub-section cannot affect the construction of the later Act.

A minor point arises in connection with Scottish peeresses. There are at the present time three or four ladies who are peeresses in the Peerage of Scotland in their own right. Before 1919 these ladies had no right to vote in the election of representative peers for Scotland. It would be very difficult to show that the exercise of a right to vote in that election is not the exercise of a public function and equally difficult to argue that if these ladies have now that right to vote, as it is submitted they have, they have not also a right to be chosen as representatives if their peers think fit to elect them. The only thing which prevents the petitioner from exercising the right of sitting in this House is the disqualification of her sex, and that disqualification has now been removed. It has long been established that a peer of the United Kingdom who is under no disability, such as infancy, is entitled ex debito justitiæ to a writ of summons. The Crown has no power either to grant or to withhold the right of sitting in this House; it is an incident in the dignity of a peerage: Coke's Institutes, Fourth Part, pp. 1, 4; Hallam's Constitutional History, 8th ed., vol. i., p. 379. That right has always been strenuously upheld by your Lordships' House. The classical case on the subject is that of the *Earl of Bristol* (1) in the time of Charles I. The King having refused him a writ of summons, the earl appealed to the House and the matter was referred to the Committee for Privileges. The Committee, after reciting that no precedent could be found for detaining a writ of summons "from any peer that is capable of sitting in the House of Parliament," and considering withal how far it might trench upon the

(1) Lords' Journals, 1625, vol. iii., p. 537.

rights of the members of the House to have their writs detained, besought the King to send a writ to the petitioner, and the writ was sent.

As regards the form of the patent, apart from the peculiar position of women, the words referring to a seat in Parliament are unnecessary and it matters not whether they are there or not, because that right is attached to the dignity. The patent in this case is in the form which has been in use for centuries, and when the limitation is to a woman the words relating to a seat in Parliament are omitted.

[LORD BUCKMASTER. The grant of a peerage to a man, either by express language or by implication, included the right to sit in this House, but it may well be that the grant of a peerage to a woman never conferred any such right at all. The whole question is whether the right was incident to the male peer or was incident to the peerage as such.]

The latter is the true view. This is the same peerage as was granted to the petitioner's father, but whenever it is in a man it carries with it the right to a seat in this House, whenever it is in a woman it does not, because she is disqualified by her sex from the exercise of this right, which is incident to the peerage. The Crown cannot grant a peerage and withhold the right to sit from any peer who is otherwise qualified; that right is not the subject of grant at all. The peerage is one thing, like an estate in fee simple, which devolves in a certain way, and each successive occupant of the dignity or estate has only such privileges in connection with it as he or she is qualified by law to enjoy.

In none of the older patents, which are set out in full in The Report on the Dignity of a Peer, vol. v., was there any grant of a right to sit. The words relating to a seat in Parliament first appeared in patents in the middle of the fifteenth century and the earlier patents in which they appear are all grants of earldoms, because the barons attended in pursuance of a writ of summons without letters patent down to a comparatively recent date. It is suggested that the true explanation of how these words came to be introduced is that they were dealing with questions of precedence.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

[He referred to the Earldom of Dorset, the Viscounty of Beaumont, and the Earldom of Somerset.]

Professor E. A. Freeman in his article on the Peerage in the Encyclopædia Britannica, 9th ed., p. 467, sums up the position as follows: "A peeress in her own right by descent or creation has all the privileges of a peer, except that of sitting in Parliament, which is suspended while the peerage is held by a female, but revives when it passes to a male heir." It is not the omission of the words with regard to a seat in Parliament that imposes any difficulty on the petitioner; it is simply the common law disqualification, and, that having been removed by statute, her right to a writ is complete. This is borne out by Lord Lyndhurst's statement of the law in the *Wensleydale Peerage Case.* (1) And see Palmer on Peerage Law in England, pp. 55, 137.

Sir Ernest Pollock A.-G. (with him *Sir Leslie Scott S.-G.*, *Bowstead* and *Geoffrey Ellis*) for the Crown. With reference to the construction of the Act of Parliament it is true that speeches made in either House when a bill is passing through Parliament cannot be looked at, but it is permissible to refer to entries in the journals in either House for the purpose of ascertaining the conditions under which the Act was passed: *Hebbert* v. *Purchas.* (2) Moreover, the Committee for Privileges is not bound by the same strictness as a Court of law. It is proposed to put in evidence an entry in the Lords' Journals recording the reason of the Lords for disagreeing with the Commons' Amendments.

[He then formally tendered an entry in the Lords' Journals of November 11, 1919, p. 432; but, on the suggestion of the Lord Chancellor, he postponed his argument on this point.]

In construing an Act of Parliament it is legitimate to examine the state of the law at the time when the Act was passed. By the Representation of the People Act, 1918, s. 9, sub-s. 5, it was provided that any incapacity of a peer to vote at an election arising from the status of a peer should not extend to peeresses in their own right. At that time it was clear that a peeress could not sit in the

(1) 5 H. L. C. 958.

(2) (1871) L. R. 3 P. C. 605, 648.

House of Lords and her privilege to vote for a member of the Commons House of Parliament was to secure, if only indirectly, that she should be represented in Parliament as a whole.

By a later Act of the same year, the Parliament (Qualification of Women) Act, 1918, it was provided that a woman should not be disqualified by sex or marriage from holding a seat in the Commons House of Parliament; therefore a peeress can hold a seat in the Commons House. It is now suggested that the Legislature intended by the use of the general words "exercise of any public function" in the Act of 1919 to give to a peeress an option to choose whether she shall sit in one House or the other, always retaining her right to vote for a member of the House of Commons. Yet a peer can neither sit in the House of Commons nor vote for a member of the House of Commons: *Earl Beauchamp* v. *Madresfield Overseers.* (1)

In determining the meaning of general words regard must be had to the intent and meaning of the Legislature, to be collected from the cause and necessity of the Act's being made and from extraneous circumstances so far as they can be justly considered to throw light on the subject; and for this purpose it may be necessary to construe an Act contrary to the strict letter: *Hawkins* v. *Gathercole.* (2) To the same effect is the judgment of Willes J. in *Chorlton* v. *Lings* (3) dismissing a claim by a woman to vote for a member of Parliament, under a statute enabling every "man" having certain qualifications to vote, by virtue of a provision in Lord Brougham's Act that in all Acts words importing the masculine gender should be deemed to include females unless the contrary was "expressly" provided. A peerage is a personal dignity and the right to receive a summons to sit is a personal right. It is a confusion of thought to say that the holder of a peerage is exercising a public function by taking his seat in the House. In the old days a baron was required to attend the King in Parliament and to serve him

(1) (1872) L. R. 8 C. P. 245. (2) (1855) 6 D. M. & G. 1, 21.
(3) L. R. 4 C. P. 374, 388.

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM.

in the time of war, but a peeress was incapable of carrying out the duties appertaining to a barony. The right or duty of attendance in Parliament could not be exercised by a peeress, and in the case of descent the heiresses took as coparceners. It was one thing to be a lord and another thing to be a lord of Parliament. The reason why peeresses did not sit in Parliament was that there was a personal incapacity. It was not a mere question of disqualification: *Earldom of Norfolk Peerage Claim* (1); Palmer's Peerage Law in England, p. 110; Pike's Constitutional History of the House of Lords, p. 95; Hallam's Europe During the Middle Ages, vol. iii., p. 123; The Barony of Lucas (considered by the Committee for Privileges on April 24, 1907).

[LORD DUNEDIN referred to *Nairn* v. *University of St. Andrews*. (2)]

The Committee are invited by the claimant by a doubtful interpretation of an ambiguous word to make a vital alteration in the composition of your Lordships' House. Yet in the case of the Union of England and Scotland and in the case of the Union of England and Ireland special and precise provisions were made as to the alterations necessary to be made in the peerage. The Legislature could never have intended by mere general words to make such a sweeping alteration in the constitution of a Chamber which, in the words of Lord Macaulay, "has no characteristic of age but its dignity."

Talbot K. C. replied.

Fox Davies held a watching brief for certain other peeresses in their own right.

EARL OF DONOUGHMORE (CHAIRMAN). The Committee have decided by a majority of 20 to 4 that the claim of the petitioner has not been made out. The Committee will assign their reasons later.

1922. June 27. VISCOUNT BIRKENHEAD L.C. My Lords, in this case, Margaret Haig, Viscountess Rhondda, petitions

(1) [1907] A. C. 10, 16.
(2) [1909] A. C. 147; 1909 S. C. (H. L.) 10.

for the issue to her out of the Crown Office of Chancery of a writ of summons to this House, and the petition has in ordinary course been submitted to the Committee of Privileges for report.

I deal at the outset, in order to dismiss it, with a particular aspect of this important matter. In doing so, I speak for myself alone.

The Attorney-General at one point of his argument tendered in evidence an entry from the Journals of this House. The admissibility of this entry was debated, but not decided. I held myself a clear view upon the matter, but was content to leave it without any expressed conclusion, for the simple reason that, as the case proceeded, it became more and more plain that the petitioner's case completely failed without reference to the parliamentary history of the matter.

On many grounds I regret this circumstance, for that history would upon its personal side have been worthy of the massive irony of Gibbon. I am, however, debarred from the entertainment of speculating upon the grounds which have disabled a noble and learned friend of mine from discovering in his legislative capacity that which he so plainly discerns when he applies his judicial self to the same subject matter.

Being thus by the course of our debate precluded from declaring even an individual conclusion, I none the less state most explicitly that I myself do not, as at present advised, accept the view that the proceedings of a Committee of Privileges are in all respects to be governed by a pedantic and absolute adherence to the rules which govern procedure in Courts of law. In particular, I make it plain that I am wholly unconvinced by any argument hitherto brought forward that a Committee of this House, sitting by its direction to report to the whole House upon its privileges, can or ought to be precluded from a reference to the Journal of this House in order to inform its mind upon any circumstance in the parliamentary history of that which is under investigation. The decision of Lord Hatherley L.C. in

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

Hebbert v. *Purchas* (1), even as construed, somewhat sparingly, by my noble and learned friend Lord Wrenbury, is conceded to permit a reference to the Journals of the House in such a case for the purposes of illustration. Is not the present a matter in which such a reference, even though limited to a strictly illustrative purpose, might have afforded your Lordships much valuable assistance ?

Excluding these considerations from my mind, I turn now to deal with the petition before the Committee.

Put shortly, the case for the petitioner is that, immediately before the passing of the Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo. 5, c. 71), she would have been entitled but for her sex to receive a writ of summons and to take her seat in the House of Lords accordingly ; that the incapacity to receive the writ was a disqualification to exercise a public function ; and that this disqualification was removed by the passing of that Act.

It rests upon Lady Rhondda, therefore, to show to the satisfaction of the Committee both that she was, but for the suggested disqualification, entitled to the writ and that that disqualification was removed by the statute. If she fails to satisfy the Committee of the soundness of either of those two propositions, her case necessarily fails.

By letters patent dated June 19, 1918, David Alfred, then Baron Rhondda, was created Viscount Rhondda of Llanwern, in the county of Glamorgan. He held his barony under the usual limitations in tail male. The letters patent conferring the Viscounty contain a special remainder to the lady who is now petitioner, conferring on Baron Rhondda, as he then was, the name, state, degree, style, dignity, title and honour of Viscount Rhondda to have and to hold the said name, etc., unto him the said Baron Rhondda and the heirs male of his body lawfully begotten and to be begotten, and in default of such issue and after his decease to have and to hold the name, etc., of Viscountess Rhondda unto Margaret Haig Mackworth (the present petitioner) and after the decease of the said Margaret Haig Mackworth to have and to hold

(1) L. R. 3 P. C. 605.

the name, state, etc., unto the heirs male of her body lawfully begotten and to be begotten.

The patent then proceeds in what are the usual words in the case of a special remainder to a daughter of the original grantee: "Willing . . . . that the said David Alfred, Baron Rhondda and his heirs male aforesaid and in default of such issue the heirs male of the said Margaret Haig Mackworth and every of them successively and respectively may have hold and possess a seat place and voice in the Parliaments and public assemblies and Councils of us our heirs and successors within the United Kingdom of Great Britain and Ireland among other Viscounts as Viscounts of Parliaments and public assemblies and Councils. And also that the said David Alfred, Baron Rhondda and his heirs aforesaid and in default of such issue the said Margaret Haig Mackworth and her heirs male may enjoy and use and every of them successively may enjoy and use by the name of Viscount and Viscountess Rhondda of Llanwern aforesaid all and singular rights privileges pre-eminences immunities and advantages to the degree of a Viscount or Viscountess in all things duly and of right belonging which other Viscounts or Viscountesses of this our United Kingdom of Great Britain and Ireland have herebefore honourably and quietly used and enjoyed or as they at present use and enjoy."

To complete the story, I should say that Viscount Rhondda, the original grantee, died on July 3, 1918, and that the present petitioner has duly proved that she is the only daughter of Viscount Rhondda and is the lady designated in the patent.

For many centuries women have not sat in the House of Lords, although during those centuries there have been women who possessed peerage dignities in the sense—whatever it be—in which Lady Rhondda possesses such a dignity. The petitioner says that the fact that they have not sat is due to the ordinary disqualification imposed by the common law of England upon persons of the female sex, and that that disqualification has been removed by the Act of 1919.

Upon a perusal of the words in Lady Rhondda's patent

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

it is clear that, according to the ordinary principles of construction, and apart altogether from such disqualifications as are imposed by the common law, she is incapable of receiving a writ by reason of the terms of the patent itself. The patent, as has been seen, confers a peerage dignity upon Viscount Rhondda and after his decease, in the events which have happened, upon the petitioner, with remainder after her decease to her heirs male. But when it comes to define the incidents of the dignity so conferred, it distinguishes between Viscount Rhondda and those males who may hereafter hold the dignity on the one hand, and Viscountess Rhondda on the other, giving to the former, and by silence denying to the latter the right to a seat, place and voice. Nor are the concluding words whereby rights, privileges, pre-eminences, immunities and advantages are conferred by reference to those "duly and of right belonging" "to the degree of a Viscount or Viscountess" without their own significance.

To this it is said in answer by the petitioner that the form of the patent makes no difference; that every holder of a peerage dignity is entitled ex debito justitiæ to a writ of summons, and that the combined effect of that which is said and that which is unsaid is either an impossible stretch of the Royal prerogative—an endeavour by the King to limit that which was illimitable—or merely as it was called "declaratory," which seems to mean a draftsman's flourish; that the words purporting to confer a right to a seat, place and voice are, therefore, "surplusage" or "otiose"; and that no inference is to be drawn from the failure expressly to confer such a right upon the petitioner; that the right to sit and vote is by the law of Parliament so inextricably interwoven with the dignity that the King cannot confer the latter without the former, though, until the passing of the Act of 1919, the common law disqualification by sex prevented this doctrine from having any practical effect in the case of female holders of peerages.

Such a claim being advanced, I will in the first place make one general observation. The rule that the words of an

instrument shall be taken most strictly against the party employing them—*verba chartarum fortius accipiuntur contra proferentem*—does not apply to the Crown: *Rex* v. *Mayor of London* (1); such a grant is construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words. "In grants from the Crown . . . . nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown": *Feather* v. *The Queen*. (2) The cases on the subject are collected by Sir Francis Palmer at pp. 62 and 63 of his book on Peerage Law in England, and he sums up the result thus: "The subject, to put it shortly, has no right to claim under a Crown grant or charter anything but what the Crown has granted in clear and unequivocal terms."

With this observation I turn to consider the contention set out above. The doctrine that the King, having created a peer, cannot direct that he shall not be summoned to Parliament had become settled constitutional law in the course of the seventeenth century. As is so often the case, it represents not in truth the statement of a legal doctrine, but the result of a constitutional struggle. In the contest between the Crown and Parliament, which was then in progress, the maintenance of the hereditary principle, as applying not only to the peerage dignity but to the right to sit and vote, was vital to the party which was endeavouring, and in the long run successfully endeavouring, to limit the Royal prerogative. It is easy to see what use George III. could have made in the eighteenth century of a constitutional position in which the right to determine whether writs should issue to particular peers depended upon the Royal will and not upon hereditary descent. Charles I. upon his accession had directed that a writ should not issue to the Earl of Bristol,

(1) (1834) 1 C. M. & R. 1, 12 (Wightman arg.). (2) (1865) 6 B. & S. 257, 283.

H. L. (E.) 1922 — VISCOUNTESS RHONDDA'S CLAIM — Viscount Birkenhead L.C.

He set out his reasons, which are not material to the present issue, in a letter of January 20, 1625, which will be found on p. 544 of the third volume of the Journals of this House. Lord Bristol then preferred a petition to the House signifying that his writ of summons is withheld from him, whereupon he humbly desires this House to become mediators for him to His Majesty that he may have his writ of summons according to the privilege of a peer of this realm. The petition was referred to the Committee of Privileges, and their report, which was presented on March 30, 1626, and will be found on the page already cited of the Journal, proceeds as follows: "after diligent search, no precedent being found, that any Writ of Summons hath been detained from any peer that is capable of sitting in the House of Parliament; and considering withall how far it may trench into the right of every member of this House, whether sitting by ancient Right of Inheritance, or by Patent, to have their Writs detained; the Lords Committees are all of opinion that it will be necessary for this House humbly to beseech His Majesty that a Writ of Summons may be sent to this Petitioner, and to such other Lords to whom no Writ of Summons hath been directed for this Parliament; excepting such as are made incapable to sit in Parliament by Judgment of Parliament or any other legal judgment."

"Whereupon the Duke of Buckingham signified unto the House, that, upon the Earl of Bristol's Petition, the King had sent him his Writ of Summons."

In 1644 there appeared the first edition of Coke's 4th Institute, and it is worth while to set out in full the constitutional doctrine there embodied upon this subject: "*Of the High and Most Honourable Court of Parliament.* This Court consisteth of the King's Majesty sitting there as in his royall politick capacity, and of the three estates of the realm, viz.: of the Lords spirituall, archbishops and bishops being in number 24, who sit there by succession in respect of their counties or baronies parcell of their bishopricks, which they hold also in their politick capacity; and every one of these when any Parliament is to be holden, ought,

ex debito justitiæ, to have a writ of summons. The lords temporall, dukes, marquisses, earls, viscounts and barons who sit there by reason of their dignities which they hold by descent or creation, in number at this time 106: and likewise everyone of these being of full age ought to have a writ of summons ex debito justitiæ. The third estate is the commons of the realme . . . . all which are respectively elected . . . . by force of the King's writ ex debito justitiæ."

Whether the historical conceptions introduced in the finding of the Committee of Privileges in *Lord Bristol's Case* and in Coke's book be true or false, it cannot be denied that by 1664 the constitutional law and practice had crystallised and were well established in the form in which Coke sets them out. No one makes any suggestion to the contrary. But to say that, because any peer who is capable of sitting, or who holds a status analogous to those of the 106 peers mentioned by Coke, is entitled ex debito justitiæ to a writ, therefore the petitioner is entitled to a writ, is to beg the question, upon which it is now the duty of this Committee to report. The writ is not to be issued capriciously or withheld capriciously at the pleasure of the Sovereign or of this House. It is to be issued, or withheld, according to the law relating to the matter, and if, under that law, it appears that there is a debt of justice to the petitioner in that matter, the writ will issue and, if not, it cannot issue.

But it is at least pertinent to notice what the practice has been as to the use of words granting the right to receive a writ so far as they affect female holders of peerage dignitaries.

In 1663, the dignity of Lucas of Crudwell was conferred by letters patent upon Mary, Countess of Kent. The limitations in the patent are very curious. They are first to the heirs male of the body of the grantee by the Earl of Kent, her husband, then to her heirs of the body by the same husband, with a special provision that if at any time there be a default of issue male of the body of the Countess and more persons than one who are co-heirs, the dignity is to be had and enjoyed by such one of the co-heirs "as by the course of descents at the Common Law of our Realm of England would

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

be hereditable to other entire and indivisible inheritances, namely, to an office of honour and public trust or to a Castle for the necessary defence of the Realm."

The words as to a seat, place and voice used to meet the curious circumstances contemplated in the patent are as follows: "Willing, &c., that all and singular future heirs of the body of the same Mary by the same Earl to be begotten who shall be males and who shall be Barons Lucas of Crudwell aforesaid by the tenour and in virtue of these presents may have hold and possess and each of them may have hold and possess a place seat and voice, &c."

This form of words is even stronger than the form of words in the present patent to indicate the mind of the draftsman. It is quite clear that it was intended that those who were males, and those who were males only, should sit in this House, and that it was contemplated that those females, who in accordance with the terms of the patent would come into possession as heirs of the body, should hold a peerage dignity divorced from the right to sit and vote.

In the same year the letters patent were the subject of an Act of Parliament (15 Car. 2, No. 15). This statute was mentioned during the argument at the Bar, and it appeared to be suggested that it was considered necessary, amongst other things, for the purpose of confirming the provision now under consideration—namely, that which gave a seat, place and voice to the males only. If the Act is examined it will be found that it is in the main an Estates Act; but in addition to making the settlements upon the marriage of the Earl of Kent and Mary, seeing that "by reason of the infancy of the said Earl (he being of the age of 19 years or thereabouts) such settlements cannot in the ordinary way be effected," the Act deals with the limitations already described as having been inserted in the patent. It is easy to understand why this should have been thought desirable. By the middle of the seventeenth century, the doctrine that a barony by writ fell into abeyance between co-heirs was well established, and that fact is indeed recognized in the words of the patent itself. It is possible that already doubts

were entertained of the kind which fell to be debated before the Committee of Privileges in the case of the *Wiltes Peerage* (1) and the *Buckhurst Peerage*. (2) In the latter case Lord Cairns delivered the famous judgment in which he says: "It is the well-established and constitutional law of the country that a peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law, and that in the descent of peerages there cannot be introduced variations or alterations in the ordinary law of the country with regard to descent; and by a parity of reasoning, there cannot be introduced provisoes and conditions controlling and moulding the descent of a peerage in a manner different from that in which real estate can be made to descend according to the law of the country."

Though we should not expect to find a seventeenth-century peerage lawyer expressing the doctrine with the force and precision of Lord Cairns in 1876, it had already taken shape, and to guard against its application to the peculiar limitations in the case of Lucas the prudence of the lawyers and of Parliament provided the statute which I have cited.

But the statute, though it thus precisely deals with the necessities of the case, does not so much as mention the restrictions imposed by the patent against the sitting in Parliament of the female successor. There appears to be no ground for supposing that any doubt was felt as to the force of the words with reference to the seat, place, and voice.

I think it right at this stage of the argument to notice the discussion which took place both in the House of Lords and in the Committee of Privileges upon the *Wensleydale Peerage*. (3) Many lay peers took part in the debate, and it may be thought that the circumstances of the case, the political issue involved, the manner in which the discussion proceeded, and the very wide range of subjects over which it wandered, render it difficult to make much use of the great array of legal talent and learning which was displayed. But

(1) (1869) L. R. 4 H. L. 126. (2) (1876) 2 App. Cas. 1, 20.
(3) 5 H. L. C. 958.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

the debate will always remain useful to the student of the constitutional theory of this House and many of the learned Lords who spoke gave clear and helpful expositions of the law. I direct particular attention to the observation made by Lord Cranworth L.C. (reported at p. 74 of MacQueen's Report of the Debates on Life Peerage). "That which gives every noble Lord the right to sit here is not his Patent of Nobility, but the Writ of Summons which he is entitled to, in consequence of that Patent"; and to the observations of Lord Campbell then Lord Chief Justice (at p. 106): "Here the Patent must be produced and read to verify the right of the claimant to take his place. If it confers such a dignity as by law gives a right to sit here, he must be admitted"; and again (at p. 116): "The right to sit in Parliament does not necessarily follow from the creation of a Barony, and Baron Wensleydale's patent in consequence contains an express grant of that right." Mr. Pike (Constitutional History of the House of Lords, p. 378) sums up the result of the case as follows: "It was not denied that the Crown might confer upon the subject the title of Baron for his life, but it was not admitted that the Crown could in this manner give him a place in the House of Lords."

It is for this reason that the Standing Orders make special provision for peers claiming by virtue of a special limitation in remainder.

The Standing Orders, having been put together as is well known from time to time to meet the exigencies of the moment as they arose, do not deal, except by silence, with the general case of a newly created peer. They provide (XIII., July 27, 1663) that "all Peers of this Realm by descent, being of the age of one and twenty years, have right to come and sit in the House of Peers without any introduction." Then (by XIV., June 25 and 28, 1715) they proceed: "Every Peer of this Realm, claiming by virtue of a special limitation in remainder, and not claiming by descent, shall be introduced"; and (by XV., May 30, 1851): "Upon the introduction of any Peer of the United Kingdom into this House the Patent by which his Peerage shall have been granted

shall, after having been read, be entered verbatim upon the Journals of the House as well as the writ of summons."

What, then, becomes of the suggestion that the right to sit is not a right granted by letters patent? Literally it is true. The letters patent require the supplement of a writ. But they give a right to demand that writ, and impose a liability to receive it and to act upon it. The letters are read in order to see whether there has been granted by them to the person who presents the writ the right to receive the writ and to sit under it. "Why is the patent read? For what purpose is it read, if you are to exercise no opinion with respect to it? Obviously it is read in order that you may have an opportunity of considering its validity, and acting according to the opinion you form respecting it": per Lord Lyndhurst. (1)

On the other hand Lord Cranworth L.C. (2) "But after all, a Patent, even though presented and enrolled, is not what of itself entitles the party to sit; he sits because he presents a Writ at the bar of your Lordships' House, commanding him to attend; and whether he has a Patent or not, is absolutely indifferent—if he has received a Writ he is bound to obey the Regal mandate." But what Lord Cranworth is here arguing is that it was in the power of Queen Victoria to summon Lord Wensleydale to the House of Lords by writ alone and without a patent. What we have here to consider is whether, having regard to the terms of the patent, the petitioner is entitled to demand a writ. Moreover, was not the whole of Lord Cranworth's argument fallacious? If in 1856 there still resided in the Crown a power to create a peer by writ, it would follow that the ordinary rules as to baronies by writ applied and that the receipt of the writ, coupled with the sitting, would have created a hereditary peerage—the very thing which it was the intention of the Crown in *Lord Wensleydale's* case not to create.

Except after prolonged search of the Patent Rolls, it would be impossible to say in how many cases, in which women

(1) MacQueen, p. 301. (2) MacQueen, p. 391.

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM. Viscount Birkenhead L.C.

have appeared in peerage patents either as original grantees or as grantees in remainder, the form of words used in Lady Rhondda's patent has been employed. It is so employed in all the cases in which ladies now alive enjoy peerage dignities conferred by letters patent, and there is evidence that this custom has been in use, if not continuously from 1663 to the present day, at least during the greater part of that period.

In the Third Report on the Dignity of a Peer (July 29, 1822, at p. 172) it is stated that "in later Grants of the Dignity of Peer of the Realm by Patent . . . . a Place and Seat in Parliament is included in the Grant by express Words, except where a Grant of Dignity has been made to a Female, who could not have a Place and Seat in Parliament: but in that Case, if the Dignity has been limited to her Male Descendants, the express Grant to those descendants of a Place and Seat in Parliament has been inserted. The Grant to the Female, therefore, operates as a mere Grant of the Name of Dignity, and of the Privileges belonging to the Dignity of Peer of the Realm, independent of those Privileges which belong to a Peer in Parliament. Where a Female has had a Grant of the Dignity of Peeress without Limitation of the Dignity to her Descendants at her Death, the Grant to her can have no Relation to the Character of Peer of the Realm as a Member of the Legislature or of the Supreme Court of Judicature. When the Dignity of Duchess of Norfolk was granted to Margaret, Countess of Norfolk, the Dignity of Duke of Norfolk having been granted to her Grandson, the Dignities so granted were separate and distinct, though the local Addition to the Name of Dignity was the same."

Until, therefore, the Patent Rolls are searched we do not know what precise meaning should be attached to the expression "in later grants" in the passage cited above. But it is unnecessary for the present purpose to go back further than 15 Car. 2 (1663), when the letters patent creating the Barony of Lucas were issued. During the next two hundred years slight and immaterial variations may have been

employed to meet particular cases. But it is clear that by 1877—indeed by a much earlier date—the forms of patent were fixed and no draftsman in the office of the Clerk of the Crown would have presumed to draft a peerage patent except in accordance with the precedents before him.

The Crown Office Act, 1877 (40 & 41 Vict. c. 41), gave express power to alter the forms of patent by Order in Council. It is admitted (indeed it forms the root of the petitioner's case) that a peerage dignity must be conferred in the form and with the incidents which appertain to that dignity. Certain variations are necessary to meet the circumstances of particular cases, but within the ambit of those variations, the instrument—whatever it be—conferring the dignity must have a certain form and be designed to effect a fixed purpose. This design and purpose by 1877 had, subject always to the allowed variations, taken a consistent shape and was embodied in successive patents in words which had become terms of art. So much sanctity did the Legislature attach to the terms of art so used that it was thought, firstly, that to enable any variation to be made in the future legislative authority was necessary, and, secondly, that, whatever variation was to be introduced, it should be controlled by Order in Council. Is it not strange that when words have been used as terms of art for centuries and have come to be so essential to the purpose of the instrument in which they appear, that in order to change them an Order in Council —itself made under statute—is necessary, it should now be suggested that they were meaningless from the beginning and are now not only meaningless but repugnant as an endeavour to express an idea which was always bad in law ?

It is not enough to argue that the words are ornamental and can be dispensed with. No person having any skill in construction could contend that the insertion of the words of grant to the original grantee, their omission to the second grantee, and their reinsertion to the subsequent holders can be explained except on one of two hypotheses—namely, either : (1.) that the words in themselves limit a grant which would otherwise have enured to the benefit of the female

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

as well as the male; or (2.) that they are aptly used to express that which the King could grant, and to make it clear that he was not endeavouring to grant that which did not lie within his power. Of the two views, I adopt without hesitation the latter. A peerage held by a peeress in her own right is one to which in law the incident of exercising the right to receive a writ is not, and never was, attached. A right to sit and vote is personal to the holder of a peerage who possesses it. It is a right which can neither be denied nor surrendered nor exercised by deputy. The right really consists in the exercise, and a common law right to do something which the common law forbids to be done is, when so defined, a contradiction in terms. The case is not one of suspension of a right or abeyance of an activity. The holder of a peerage dignity who is a minor is not entitled to receive a writ, but he may grow up and will then become so entitled. A felon (Forfeiture Act, 1870 (33 & 34 Vict. c. 23, s. 2)) or a bankrupt (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 32)) is not entitled to receive a writ, but a felon may receive a pardon and a bankrupt his discharge. These things are possible in nature and permissible in law; but a person who is a female must remain a female till she dies. Apart from a change in the law, she could not before 1919 both be a woman and participate in the legislative proceedings of the House of Lords. By her sex she is not—except in a wholly loose and colloquial sense—disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which ex vi termini cannot include this right.

The judgment of Willes J., in *Chorlton* v. *Lings* (1), is express authority to this effect. No authority was cited to the contrary, and I believe the true view to be that the practice of drawing the patents with remainders to females in the form which is now many generations old, and which is exemplified in this case, shows how long it has been the unanimous view of the profession.

To appeal to the incidents of the peerage of a man is, therefore, a false analogy. The question is, what right does

(1) L. R. 4 C. P. 374.

the common law attach to the peerage in respect of sitting and voting? Is it the right to do so absolutely, or is it the right to do so being a man? In other words, before it can be stated that the female holder of a peerage dignity is entitled ex debito justitiæ to the issue of a writ, you must determine what is the obligation of justice in respect of such a holder of a peerage dignity. What matters is the quality and capacity of the holder in the concrete, and not the general incidents of peerage in the abstract.

Again, it must be immaterial whether the peerage was originally created in favour of a male with special remainder to a female, or originally in favour of a female and her heirs male. Sex is the quality of the holder for the time being, not of the dignity held. While a woman holds the peerage, the right to sit and vote is hers or it is nobody's. It is clear that nobody else has it. To say that it is in abeyance is to evade the question. Whoever may be entitled in remainder, and whatever rights may be incident to his becoming entitled in possession, the peeress, while in possession, has all that the peerage can give. It is then her peerage and it is a peerage to which the law—whether it has been conferred by patent and express words or by writ and by implication—has not annexed the right to exercise this public function, she being a woman. In other words, a peeress in her own right is not a person who has an incident of peerage but is disqualified from exercising it by her sex. She is a person who for her life holds a dignity which does not include the right of a female to exercise that function at all.

Before I pass from this branch of the subject, I must draw attention to the form of the writ itself. It runs: "GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To Our right trusty and well beloved Greeting WHEREAS by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us the State and defence of Our said United Kingdom and the Church. We have ordered a certain Parliament to be holden at Our City of Westminster on the

H. L. (E.)
1922
VISCOUNTESS RHONDDA'S CLAIM.
Viscount Birkenhead L.C.

day of next ensuing And there to treat and have conference with the Prelates Great Men and Peers of Our Realm We strictly enjoining command you upon the faith and allegiance by which you are bound to Us that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates Great Men and Peers to treat and give your counsel upon the affairs aforesaid And this as you regard Us and Our Honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in nowise do you omit WITNESS Ourself at Westminster the day of in the Year of Our Reign." (1)

It will be observed that it is imperative in its terms. It does not purport to confer a right or privilege, but to demand the fulfilment of a duty. If a glance be given at the Lords' Journals during the seventeenth century, it will be observed that this aspect of the case was more present to the minds of those who then sat in Parliament than it is now to us. On almost every day on which the sittings of the House are recorded and the names of those present are given, there is added a list of those who are excused from attendance. The obligation to attend appears to depend in its origin upon the common law. It was reinforced by 5 Ric. 2, stat. 2, c. 4, which enacts as follows: "All and singular Persons and Commonalties, which from henceforth shall have the summons of Parliament, shall come from henceforth to the Parliaments in Manner as they are bound to do, and hath been accustomed within the Realm of England of old Times. And whatever Person of the same Realm, who henceforth shall have such Summons (be he Archbishop, Bishop, Abbot, Prior, Duke, Earl, Baron, Banneret, Knight of the Shire, Citizen of City, Burgess of Borough, or other singular Person, or Commonalty whatever) doth absent himself, and

(1) A writ when issued to a peer who succeeds during the course of a Parliament is in a slightly different form, but the differences are not material as regards the present matter.

cometh not at the said Summons (if he cannot reasonably and honestly excuse himself thereof to our said Lord the King) shall be amerced and otherwise punished, according as of old Times hath been used [to be done] within the said Realm in the said case."

In a case where the House is invited to place the strictest possible construction in favour of the petitioner upon the words both of a statute and of an instrument of grant, this aspect of the case is not without significance.

I pass now to examine that branch of the case which turns upon the construction of the words of the Act of Parliament.

The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act. There can be no doubt that whatever the words mean, and whether or not they be taken in their most literal sense and must be construed so as to remove all possible disqualification, they are words as vague and general as can be found in any Act of Parliament. What we have to ask ourselves is whether the Legislature, when dealing with a constitutional question of the utmost gravity, and effecting a revolutionary change in the privileges of this House, and dealing with and binding His Majesty's prerogative, has seen fit to do so by words which can be thus described.

In an examination of this question, it is first appropriate to inquire how the Legislature has, whether in recent times or in times more distant, dealt with similar questions.

The first point to notice is the meticulous care with which, whenever the Legislature has dealt with the right or duty of attending in this House or voting for election to the other, it has expressed its will upon the matter. So far as this House is concerned, it is only necessary to refer to the elaborate provisions relating to the rights and duties of Scottish peers upon the union of England and Scotland in 6 Anne, c. 11, and those relating to the rights and duties of Irish peers

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

upon the union of Great Britain and Ireland contained in the Act of Union of 1800. It is worth noting also that, when power was given to create life peers for the purpose of hearing appeals, their right to a writ of summons to attend and to sit and vote in the House of Lords was dealt with by express words, both in s. 6 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and in s. 2 of the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70).

As regards the other House, it would be tedious and it is unnecessary to set out the precise wording of the enactments whereby the franchise has been from time to time conferred; but during the last forty years electoral rights and privileges have on several occasions been granted by statute to women and it is of interest to consider the following examples of the legislative methods and forms employed for the purpose.

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 63), enacts that "for all purposes connected with and having reference to the right to vote at municipal elections words in this Act importing the masculine gender include women." The Local Government Act, 1894 (56 & 57 Vict. c. 73), enacts by s. 3, sub-s. 2, that: "no person shall be disqualified by sex or marriage for being elected or being a member of a parish council," and by s. 23 that "no person shall be disqualified by sex or marriage for being elected or being a Councillor" (that is of an Urban District Council). The Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), enacts by s. 4, sub-s. 1, that: "a woman shall be entitled to be registered as a parliamentary elector for a constituency (other than a university constituency) if she—(*a*) has attained the age of thirty years; and (*b*) is not subject to any legal incapacity; and (*c*) is entitled to be registered as a local government elector in respect of the occupation in that constituency of land or premises (not being a dwelling-house) of a yearly value of not less than five pounds or of a dwelling-house, or is the wife of a husband entitled to be so registered." It then proceeds with great particularity to set out in what circumstances women shall be entitled to be registered as parliamentary electors for a university constituency and as

local government electors for any local government electoral area. The Parliament (Qualification of Women) Act, 1918 (8 & 9 Geo. 5, c. 47), which for the first time conferred upon women the right of sitting and voting in the House of Commons, did so in the following words: "A woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a Member of the Commons House of Parliament."

The close and accurate expressions used when it was desired to confer upon women the right of sitting, say, upon a parish council, point to the need of great caution in construing words which, in their vague and general application, as it is contended, confer the right of sitting and voting in this House, and confer it not only upon those women whom the King may hereafter ennoble, but also upon those for whose ennobling the prerogative has not yet been exercised.

Nor does the matter stop there. The Representation of the People Act, 1918, deals specially with the position of the petitioner and of all other peeresses in their own right, and enacts by s. 9, sub-s. 5, that: "Any incapacity of a peer to vote at an election arising from the status of a peer shall not extend to peeresses in their own right." This section created a class of persons who, holding peerage dignities, though they were not peers of Parliament, were to possess the privilege of voting at a parliamentary election. It is now suggested (indeed it is necessary for the petitioner to contend) that the Act of 1919 conferred upon this class the additional privilege of sitting in the House of Lords.

It is material to consider how in past ages the House of Commons looked upon the relation of a peer of Parliament towards that House.

In 1699 the House of Commons passed the following resolution: "No peer of this Kingdom hath any right to give his vote at the election of any member to serve in Parliament."

In the year 1700 they passed this further resolution: "If a peer or Lord Lieutenant of a County concerns himself in

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

elections, it is an infringement of the liberties of the Commons."

A hundred years later the union with Ireland rendered it necessary to introduce a change into these resolutions, which, ever since their first passing, had been repeated at the commencement of every session, and accordingly on April 27, 1802, the following resolutions were passed: "Resolved, that no peer of this realm, except such peer of that part of the United Kingdom called Ireland as shall for the time being be actually elected and shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in parliament. Resolved, that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of parliament or other peers or prelate, not being a peer of Ireland at the time elected and not having declined to serve any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in parliament, except only any peer of Ireland at such elections in Great Britain respectively where such peer shall appear as a candidate or by himself or any other be proposed to be elected": see *Earl Beauchamp* v. *Madresfield Overseers.* (1)

These resolutions are declaratory of the common law and without any doubt they embody the law of Parliament.

Such being the custom of the Legislature in dealing with qualifications to vote for and sit in electoral bodies and legislative assemblies, such being the rights of peeresses to vote at parliamentary elections, and such being the doctrines of the constitution as regards the abstinence of members of this House from interference with elections to the other, we are now asked to believe that by words such as have never been used before in such a connection, the Legislature intended to create for the first time a body of persons who may concurrently sit in this House and vote for the other. Is there any rule of English law which compels us, where general words are used, so to construe them as to produce

(1) L. R. 8 C. P. 245.

a result which is so inconvenient in itself and so repugnant to our constitutional theories ?

On the contrary, a long stream of cases has established that general words are to be construed so as, in an old phrase, "to pursue the intent of the makers of statutes": *Stradling* v. *Morgan* (1), and so as to import all those implied exceptions which arise from a close consideration of the mischiefs sought to be remedied and of the state of the law at the moment, when the statute was passed. "The Sages of the Law," say the Barons of the Exchequer in *Stradling* v. *Morgan* (1), after the consideration of a long line of cases, "heretofore have construed Statutes quite contrary to the Letter in some appearance, and those Statutes which comprehend all Things in the Letter they have expounded to extend but to some Things, and those which generally prohibit all people from doing such an Act they have interpreted to permit some People to do it, and those which include every Person in the Letter they have adjudged to reach to some Persons only, which Expositions have always been founded upon the Intent of the Legislature, which they have collected sometimes by considering the cause and Necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign Circumstances. So that they have ever been guided by the Intent of the Legislature, which they have always taken according to the Necessity of the Matter, and according to that which is consonant to Reason and good Discretion."

This case was considered in the case of *Hawkins* v. *Gathercole*. (2) In that case Turner L.J., in giving judgment, quoted and approved the passages which I have already read and continued as follows: "The same doctrine is to be found in *Eyston* v. *Studd*, and the note appended to it, also in Plowden (3), and in many other cases. The passages to which I have referred, I have selected only as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us, we have

(1) 1 Plowd. 203, 205. (2) 6 D. M. & G. 1, 21.
(3) Pp. 459, 465.

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM. Viscount Birkenhead L.C.

therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

When the learned Lord Justice turns to discuss the "extraneous circumstances" which, as he thought, a Court of law might take into consideration in the construction of an Act of Parliament his reasoning (with the substitution of this statute for that which then fell to be construed by the Lords Justices in Chancery and with the substitution of the two Acts of 1918 for the Acts which he was considering in comparison with it) might be applied almost verbatim to the matter now before us. I do not set it out at length here, but reference should be made to pp. 28 and 29 of the report.

These two cases, decided at an interval of some 300 years, furnish, when taken together, a complete exposition of the common law upon this subject. Since 1855 the doctrines which they embody have been applied in innumerable instances. Of these I select for particular mention three which have a peculiar value in relation to the matter now under consideration, since in each case there arose the question whether by general words Parliament had affected the parliamentary position of women. They were mentioned at the Bar as exemplifying the legal view of the status of women. I cite them not with that purpose, but as instances of the application of the doctrines of *Stradling* v. *Morgan* (1) to the construction of a modern Act of Parliament.

The first of these cases is that of *Chorlton* v. *Lings*. (2) This case is famous because of the judgment of Sir James Shaw Willes, in which, basing himself upon Selden, de Synedriis Veterum Ebraeorum, he protests against the legal incapacity of women being attributed to "any underrating of the sex either in point of intellect or worth." The true point of the case, however, is more closely related to the

(1) Plowd. 203–5. (2) L. R. 4 C. P. 374, 387.

matter now in hand. The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), enacts that "every man shall be entitled to be registered as a voter." By Lord Brougham's Act (13 & 14 Vict. c. 21, s. 4) "words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided." Upon this, it was contended that the word "man" in the Act of 1867 included women and that they were, therefore, entitled to be registered as voters. The Court held that it did not. "The application of the Act 13 & 14 Vict. c. 21," says Willes J., "contended for by the appellant, is a strained one. It is not easy to conceive that the framer of that Act, when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammar and law, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing."

The next case is that of *Beresford-Hope* v. *Sandhurst*. (1) It would indeed be difficult to imagine any more precise words than those which the Court had there to construe. They were (see Municipal Corporations Act, 1882, s. 11, sub-s. 3): "every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor."

The sixty-third section of the same Act provided that "for all purposes connected with and having reference to the right to vote at municipal elections words in this Act importing the masculine gender include women." There can be no question, therefore, that women were entitled to elect to the office of councillor. The question which the Court had to decide was whether under the words of s. 11 they were qualified to be elected. The Court held that they were not.

The decision looked at broadly may be cited as authority

(1) (1889) 23 Q. B. D. 79.

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM. Viscount Birkenhead L.C.

for the proposition that extraneous circumstances may be looked at to cut down general words in an Act of Parliament. But the judgments of Lord Coleridge C.J. and Fry L.J. (1) make it clear that the decision can be supported on another ground—namely, that the section of the statute then under construction, which dealt with women, conferred upon them expressly the right to vote and was silent as to the right to be elected. At any rate Fry L.J. regarded the sixty-third section "as ascertaining, both affirmatively and negatively, the rights which have been conferred upon women; ascertaining them affirmatively by express statement, and ascertaining them negatively by necessary implication." *Beresford-Hope* v. *Sandhurst* (2) remains an example of a case where words apparently general are cut down, though the reason for cutting them down may possibly there have been another expression in the same statute as well as the general attitude of the Legislature and the general common law doctrines.

The next case is that of *Nairn* v. *University of St. Andrews*. (3) By s. 27 of the Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), "every person whose name is for the time being on the register . . . . of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such University," and by sub-s. 2 of s. 28 of the same Act "all persons on whom the university to which such general council belongs has . . . . conferred" certain degrees are to be members of the general council of the respective universities. The appellants, who were women, were graduates of the University of Edinburgh—a university within the meaning of the Act—and as such had their names enrolled on the general council of that university, and they claimed the right to vote in the election of the parliamentary representative of the university. I refer to the case mainly for the purpose of citing the judgment of Lord Loreburn L.C.: "If this legal disability is to be removed, it must be done by

(1) 23 Q. B. D. 93, 99. (2) [1889] 23 Q. B. D. 79.
(3) [1909] A. C. 147, 160, 161.

Act of Parliament. Accordingly the appellants maintain that it has in fact been done by Act of Parliament. . . . . I will only add this much as to the case of the appellants in general. It proceeds upon the supposition that the word 'person' in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are."

There is a further and a different argument which may be based upon the construction of the statute itself. It commences in general words by removing a disability; it then proceeds by words which may be thought particular to remove disqualifications for holding civil or judicial posts, or civil professions or vocations, or admission to incorporated societies, and lastly it deals with the position of women under the law relating to juries. It is even so precise in its language as to make it clear that, when it is dealing with admission to an incorporated society, it includes such a society whether it has been incorporated by royal charter or otherwise—a respect for the sanctity of these august bodies which, upon the contention of the petitioner, the Legislature has not thought fit to pay to the higher House of Parliament.

As regards jury service, the statute looks upon the matter

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

mainly as a liability. It is difficult, when one writes after the event, to be certain whether, in colloquial language, before the passing of the statute one would have spoken of the citizen's right to serve upon a jury, or a citizen's liability to be compelled to do so. No doubt different citizens—whether male or female—may consider the matter in different lights. It would, however, be to affect a more than judicial innocence to pretend that there was not immediately before the passing of the statute a body of organized opinion which demanded that women should be made both eligible and liable to serve upon juries as a right to which they were entitled by virtue of their citizenship. The words of the jury summons are imperative. As I have pointed out above, the words of a summons to this House are imperative. Service upon juries is enforceable by fine, though the common sense and discretion of the summoning officer and of the Court mitigate the universality of the obligation. Attendance in this House is by statute enforceable by fine, though many years have passed since any attempt has been made to put this law into practice. It was so enforceable by fine, as is shown by the Journals to which I have drawn attention, at the date at which the doctrines as to the rights and liabilities of a peer and of a peeress took final shape. "There have been cases in troublous times where persons have been fined, and very heavily fined, because they did not, in obedience to the King's Writ, come and attend in this House. At the time of the Gunpowder Plot two peers were fined, one in 6,000 marks and the other in 1,000 marks, because they neglected obedience to the Writ": per Lord Cranworth L.C., MacQueen's Debates on the Life Peerage Question, p. 392.

It seems to me impossible, even if this point alone be considered, to suppose that the Legislature, when endeavouring to confer upon women a privilege which was coupled with a duty, could have used words which were so loose as respects the privilege and so inapt as respects the duty, and this view seems to me to be put beyond all argument by the words used with regard to jury service.

For these reasons, I find no difficulty upon the construction

of the statute alone in reporting to the House against the petitioner in this case. It is sufficient to say that the Legislature in dealing with this matter cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House. And I am content to base my judgment on this alone. I have, however, in the earlier portion of my speech dealt fully with the points arising upon the document creating the peerage and upon the nature of the peerage dignity itself, because they were elaborately argued at the Bar, are of great historical interest and seem to me also to be fatal to the petitioner's claim. I wish to make it clear in expressing this view that I should hold the same opinion whether Lady Rhondda sat under a patent or under a writ.

It remains for me to notice, as I feel bound to do, the conclusion of the speech of my noble and learned friend Viscount Haldane, which, owing to his courtesy, I have already had an opportunity of reading. It is unnecessary for me to notice at any length his criticism of the decision arrived at, when the Committee sat, that their view upon the matter should be made public immediately. That decision was arrived at by a significant majority, in which the peers who have special legal qualifications and those who make no claim to such qualifications were represented in proportions similar to their proportions upon the Committee generally. It was a decision which they were free to make and it was freely arrived at, and in the mouth of any peer other than my noble and learned friend the criticism upon the action which the Committee then saw fit to take might almost be counted presumptuous.

But upon the fears which my learned and noble friend entertains that the decision of this Committee is in some way impaired by this circumstance, and upon the invitation which this suggestion seems to hold out to other female aspirants, I feel bound to express the view which I hold. It offers the prospect that through a long vista of years successive Committees may be occupied in discussing this interesting

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

question until one is found which is prepared to give a decision commending itself alike to the petitioner and to my noble and learned friend.

Further, my noble and learned friend Lord Wrenbury derives satisfaction from the reflection that in no Court of justice, from the lowest to the highest, including this House, can this case hereafter be cited as any authority upon the proper construction of the statute, and that no judge would be bound to follow the present case as any authority upon the true construction of the Sex Disqualification (Removal) Act.

It is no part of my duty to allay my noble and learned friend Lord Haldane's fears or to deprive my noble and learned friend Lord Wrenbury of any of the satisfaction which alleviates the circumstance that upon this occasion he finds himself in so inconsiderable a minority. I think, however, that for the guidance of the petitioner and any other lady in a similar position who does not take an especial delight in litigation for its own sake, without any regard to its probable result, I ought to examine these propositions with some care lest she should be tempted to take a course which would result for her in heavy costs and inevitable disappointment, and for your Lordships in a permanent session of this Committee.

I venture to recall to the minds of my noble friends the observations contained in a book of some authority—Cruise's Treatise on Dignities, 2nd ed., 1823, at p. 319—where the learned author, dealing with a similar suggestion, says, " the resolutions of the House must in general be deemed final and conclusive on the claimant, and all those deriving their title through him ; for the agreement of the claimant to the reference binds him to submit to the determination ; otherwise the trial of his claim by the Committee of Privileges would be perfectly nugatory. For if the resolution was against him, he would renew his claim. If he did not, his son would ; so that the matter could never be put to rest."

This seems to me to be common sense and in accordance with the ordinary doctrines of res judicata. There are, it is true, differences between the effect of the report of the

Committee of Privileges and the judgment of a Court of law. They are too obvious and too numerous to be set out here. In its essence, the main difference rests in the fact that the reports of the Committee of Privileges and the resolutions of the House taken upon them are in themselves merely the advice given to His Majesty upon the reference which he has made to the House. It is clear that the advice tendered in any one case cannot be pleaded, as it were, as a bar in law to a petition by another person for a right to another dignity, even though the circumstances attending the claim and the point of law arising upon it may be precisely the same. It is, therefore, open to all the other ladies who hold peerages in their own right successively to petition His Majesty to refer the matter to this House. As to whether His Majesty is bound to make any such reference is a matter upon which it is unnecessary at this stage to express any opinion.

There remains the more important point—namely, the authoritative character of the opinions now delivered as distinguished from the binding character of the quasi judgment pronounced.

This case was originally heard by a Committee which consisted of three of my noble and learned friends and four of those of my noble friends who lay no technical claim to the appellation of learned, though some of them might justly advance a title to learning in these matters.

The case was heard very shortly. My noble and learned friends, Lord Haldane and Lord Wrenbury, found no difficulty in at once forming a view upon the matters presented to them, and both formed and expressed it within such limits as were set, on the one side, by the hour of the sitting of the Committee, and, on the other, by the near approach of the midday adjournment. I confess that I am bewildered that these two noble and learned Lords, who found an immediate decision possible after three hours' debate upon an argument far less fully presented, should indulge in strictures, not less unusual because covert, on an exactly similar course adopted by the overwhelming majority of their technical colleagues on a later occasion.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

Most unfortunately many of those Lords, whose position not only gives them a right but confers upon them a duty to tender advice upon legal matters to this House, found reason to suppose, on examining the report of the proceedings, that the matter had not been presented to the Committee in all its bearings, and that, so far as it was presented, they would have been inclined to arrive at a conclusion different from that reached by the Committee.

These Lords, of whom I was one, advised the House of Lords, therefore, to refer the matter back for further hearing. The Committee constituted for this purpose contained twelve law Lords as they are usually called, among whom were comprised, in addition to myself, three ex-Lord Chancellors, five out of six of the Lords of Appeal in Ordinary (the sixth being detained elsewhere by public duties), and three other Lords, whose constant assistance to us when the House is sitting for judicial purposes I gladly recognize, and whose authority to advise on such a matter as this is indisputable.

For the moment I exclude altogether the fact that there were associated with us upon the Committee other Lords who, though some of them were deeply versed in the law, do not fall within the definitions of the Appellate Jurisdiction Act, 1876. There remain these twelve peers of whom I have spoken. Of these, eight voted for an immediate decision and four against. Upon the further question as to whether the petition succeeded or failed, eight voted against the petitioner, two for the petitioner, and two abstained, and the two who abstained now concur in the opinion that the petition should fail. I am unable in these circumstances to understand what force can be given to those of Lord Wrenbury's observations which state that the Committee is a mixed tribunal of laymen and of those generally styled "learned in the law," and that the laymen did not wait to receive assistance from their legal colleagues before pronouncing their judgment, unless I am to suppose—as indeed may be the case—that the eloquence and learning of Lord Haldane and Lord Wrenbury, in spite of the opposition of their technical colleagues, would have ultimately conquered what

appeared to be the firm and, as I think, the laudable opinion already formed by the laymen that they agreed with me and did not require further enlightenment. Why three of my learned friends should have been able in three hours to dispose of a matter which twelve cannot with propriety decide in two days is nowhere precisely explained, nor do I find myself able to understand it.

It remains for me to notice the doctrine exemplified in the *Wiltes Peerage Case*. (1) Surely Lord Haldane overstates the effect of the opinions in that case. The preliminary point was there taken by the claimant that the matter was in effect res judicata, having been determined upon the case as it was suggested, similar in all respects, of the Devon Peerage. Opinions were delivered by three peers—Lord Chelmsford, Lord Redesdale and Lord Colonsay. Of these, Lord Redesdale decided against the claim on the ground that the matter was indeed res judicata, but a res which had been adjudicated not, as had been suggested in the argument, in the Devon Peerage and in favour of the petitioner, but in the first year of Henry IV., and against him. Lord Colonsay followed him in this opinion, which he expressly made the basis of his decision: "The result, then, at which I have arrived is, that any question as to the Earldom of Wiltes must be held to have been concluded in the beginning of the reign of Henry IV., and cannot now be opened up, whatever may be the weight due to the decision in the *Devon Case*." Lord Chelmsford's opinion is more directly in support of my noble friend's doctrines. The reasoning on which he supports it is in other respects very inconvenient for the petitioner's case, for he appears to assert almost baldly the claim to prerogative right in the Crown, which is hardly consistent with that which is the basis of the argument put forward ex debito justitiæ. "The resolutions of Committees for Privileges are merely for the purpose of information and advice to the Crown. The Crown, though it generally acts upon, is not bound by them. It may exercise its own discretion in giving or refusing its assent to the resolutions."

(1) L. R. 4 H. L. 126, 148, 170.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Birkenhead L.C.

Lord Chelmsford, however, finally based his decision on reasoning which made all observations as to the binding character or otherwise of the *Devon Peerage Case* wholly obiter, though he did not hesitate to express an opinion which was adverse to that decision.

The plain truth is that the reasoning of peers who from time to time deliver opinions or speeches upon peerage cases in these committees has such binding force as is due to the esteem which present or future generations may attach to their positions and authority in the law. The judgments in themselves "will always be entitled to respect and consideration": per Lord Chelmsford, *Wiltes Case*, at p. 147, and I am unable to understand the suggestion that the exposition of the law by the legal peers upon the Committee of Privileges is of any less authority than is their statement of the law in any case which comes before them when sitting upon appeal from a Court of law.

VISCOUNT HALDANE. My Lords, I have had the misfortune to find myself unable to agree with the conclusions come to about this claim by the majority of the Committee. I think I had better state definitely my reasons for dissenting.

This was a petition as of right to the Sovereign for a writ of summons to Parliament, to be issued to the petitioner. The petition was referred by His Majesty to the House of Lords for advice, and by the House to this Committee in the ordinary course.

It is not in dispute that letters patent were granted on June 19, 1918, conferring on the late Lord Rhondda and the heirs male of his body the dignity of a viscount. In default of such heirs male, they conferred the dignity on his daughter, the claimant, in tail male. The letters patent further provided that the late Lord Rhondda and the heirs male of his body, and in default of such issue the heirs male of the claimant, should successively have a seat, place and voice in Parliament as viscounts, and also that the late Lord Rhondda and his heirs male aforesaid, and in default of these, the claimant and her heirs male, should enjoy and

use by the name of Viscount or Viscountess Rhondda all the rights and privileges duly belonging to other viscounts or viscountesses. It thus appears that the letters patent, which were expressed as granting a seat in Parliament to the males who took under its limitations, were not expressed to grant such a seat to the claimant or to any female.

The late Lord Rhondda died without issue male on July 3, 1918, and thereupon the claimant succeeded to the peerage. Subsequently, on December 23, 1919, the Sex Disqualification (Removal) Act was passed and came into operation. The question is whether the effect of this statute was to entitle the claimant to a writ of summons to Parliament.

Sect. 1 enacts that a person is not to be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society, and that a person shall not be exempted by sex or marriage from the liability to serve as a juror. The initial words of the section are thus words prima facie removing all disqualification for the exercise of any public function, while subsequent portions of the section get rid of disqualifications for appointments, for entering professions, and for admission to incorporated societies, and the final words enact liability to serve on juries.

The initial words appear on the face of them sufficient to enable a woman to exercise what is obviously a public function, that of sitting and voting in Parliament. Can it cut down the natural interpretation to be put on these words that a little over a year previously Parliament had passed a Qualification of Women Act, which provided that a woman was not to be disqualified by sex or marriage from sitting or voting in the House of Commons? All that earlier statute did was to remove a disqualification for a particular public function; it did not aim at getting rid of the general disqualification which the law imposes on the mere ground of sex. The title of the later Act, as well as its language, shows

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Haldane.

that no less than this was the wider purpose to which Parliament had meantime advanced. A more plausible suggestion for construing the general words of the later Act as subject to restriction was based, in the argument at the Bar, on s. 9, sub-s. 5, of the still earlier Representation of the People Act, passed on February 6, 1918, which provides that any incapacity of a peer to vote at an election arising from the status of a peer shall not extend to peeresses in their own right. At that time such a provision was required, because peeresses in their own right were by law debarred, not merely from sitting in Parliament, but from voting at elections. The Sex Disqualification (Removal) Act of 1919 removed the former bar, and it might well have been expected to provide for the repeal of the earlier section I have referred to, on the ground that the justification for its enactment was gone. It did not do so, possibly because of an oversight. It may be that in consequence a peeress in her own right can vote at an election. But even if that be so, it can hardly in itself afford a ground on which judges can properly treat the language as excluding from the scope of the later and perfectly general words peeresses in their own right, who are in no way in any other respect put on a different footing from other women, as regards the general release from disability arising from sex to exercise public functions. Are such peeresses, on a contrary hypothesis, to be excluded altogether from the benefit of the Act, and, if not, where is the line to be drawn? If they are not to enter Parliament on the ground that they are excluded from the scope of the general words, how are they to be at liberty to do the other things mentioned in s. 1? But it appears to be difficult to find between the two sections any logical inconsistency. It may be our conjecture that an oversight was made about the franchise. But, on the main question of construction, the sections do not relate to the same subject matter, and legally are not out of harmony.

My Lords, it appears to me to be no more possible to say that the removal of the disqualification we have been considering was not within the purpose of the words of the later

and general Act. General words have, of course, on occasions been given by the Courts restricted interpretation. But that has been only when the scheme of the statute read as a whole, or the special character of the purpose as expressed by the Legislature in the statute itself or in some other statute or law on which it bears, indicates such a restriction as intended by the Legislature itself. Now here, the very title of the Act negatives this, for it shows that the removal of sex disqualifications of all kinds imposed by the law was its express and general purpose.

My Lords, the only other point made on the construction of the Act was that this Committee might be entitled to look at what passed while the Bill was still a Bill and in the Committee stage in the House. It was said that there amendments were moved and discussions took place which indicated that the general words of s. 1 were not regarded by your Lordships' House as covering the title to a seat in it. But even assuming that to be certain, I do not think, sitting as we do with the obligation to administer the principles of the law, that we have the least right to look at what happened while the Bill was being discussed in Committee and before the Act was passed. Decisions of the highest authority show that the interpretation of an Act of Parliament must be collected from the words in which the Sovereign has made into law the words agreed upon by both Houses. The history of previous changes made or discussed cannot be taken to have been known or to have been in view when the Royal assent was given. The contrary was suggested at the Bar, though I do not think the point was pressed, and I hope that it will not be thought that in its decision this Committee has given any countenance to it. To have done so would, I venture to say, have been to introduce confusion into well-settled law. In *Millar* v. *Taylor* (1) the principle of construction was laid down in words, which have never, so far as I know, been seriously challenged, by Willes J. as long ago as in 1769: "The sense and meaning of an Act of Parliament must be collected from what it says when

(1) 4 Burr. 2332.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Haldane.

passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign."

My Lords, I now turn to what seems to me the crucial point in this claim. Assuming Lady Rhondda to have, by grant from the Crown, the full status of nobility in the form of a viscounty in her own right, but no title to sit in your Lordships' House declared in the letters patent creating the dignity, is she entitled to a writ of summons? Such a dignity is analogous to an estate in real property, and is an inalienable incorporeal hereditament flowing from the Sovereign as the fountain of honour. I take it to be clear that a male peer having such a dignity is entitled, in virtue of his status as a noble, to claim a writ of summons as a collateral legal right, annexed by the law to his dignity, and ex debito justitiæ. Of course, he requires a writ, but the point is that he is entitled to it as of right, as an incident which the law of the constitution, and not the grant of the Sovereign, attaches to his peerage. Since the *Bristol Case* in 1626, that has hardly been open to question. No doubt, in the time of the Plantagenets, and perhaps even for a little later, the right was not fully recognized by the Sovereign. In early days the Sovereigns or some of them claimed that the prerogative extended to the withholding of writs for the House of Commons, and probably for this House also. Those of your Lordships who are interested in this ancient assertion of prerogative right will find some account of it in Lord Campbell's speech in the *Wensleydale Peerage Case* reported in a volume to which I shall refer. But it seems clear that, for centuries since then, the disappearance of any such prerogative right had become completely recognized, as the outcome of evolution in the constitution and in our unwritten lex et consuetudo Parliamenti. The language of Lord Lyndhurst in the *Wensleydale Case* (at p. 300 of MacQueen's volume containing the report) leaves the nature of the constitutional right hardly doubtful. He says: "When a person comes to your Lordships' Bar with a patent of

Peerage, and with his Writ of Summons, what is the first step that is taken ? The first step is to read the patent. Why is the patent read ? For what purpose is it read if you are to exercise no opinion with respect to it ? Obviously it is read in order that you may have an opportunity of considering its validity and acting according to the opinion you form respecting it. My Lords, the facts are decisive as to the authority and jurisdiction of your Lordships in matters of this nature. My Lords, it is the right and it is the duty of your Lordships, and of every assembly similar in character to your Lordships, to see that the assembly is properly constituted. If a Writ of Summons is withheld from a party entitled to it, you have a right to insist that it shall be issued. If, on the other hand, a party appears at your Lordships' Bar with an invalid patent, you have a right to prevent his intruding himself into your assembly. In both cases your right is the same, your duty is the same ; you have the right and the duty to see that the House is properly constituted."

My Lords, it has been suggested to us that it is within the power of the Crown to confer a peerage which in the case of a woman shall exclude that right to a place in the Upper Chamber which attaches by law in the case of a man, and that the existence of such a power should be taken into consideration in construing the Acts to which I have referred. I can only say that I have been unable to discover any foundation in the existing law of the constitution for the existence of this suggested power. Whatever latitude in summoning peers to sit may have existed in days before the reign of the Stuarts, there has since then been a definite set of principles, not only governing the dignities which the Sovereign can create, but defining the title to a seat in this House. The right to sit is not a right granted by letters patent. It is due to no grant of such a right by letters patent, which only recognizes it by the words used. It is attached by the law and the constitution to the status of a peer. A peer, of course, requires a writ to enable him to take his place. That is why a writ accompanies the letters patent. But to this writ he is entitled as an incident attached

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Haldane.

by law to his status and, as Lord Lyndhurst said, as of right. Nothing will deprive him of it excepting some recognized disability, such as that arising from bankruptcy, from conviction for felony, from infancy, or, in the case of a woman, from the general disability which the common law of the land used to impose on her in respect of her sex up to the end of 1919. No doubt a woman was formerly not entitled to such a summons. Of course, if she had applied for one she would have been told that the common law debarred her from it. But after the best research I have been able to make I can find no trace of any other origin for her want of right than the disability the common law of this country imposed on all women to exercise even public functions which they would, but for their sex, have had a title to perform. Even the express grant of the Sovereign could not have legally conferred a title to sit on her. The right to the writ was, in the case of a man, a legal incident of the dignity. The reason why peeresses were not entitled to it was simply that as women they could not exercise the public function. That appears to have been the considered conclusion of James Shaw Willes J., one of the most learned and accurate exponents of the law of England who ever sat on the Bench. He says in *Chorlton* v. *Lings* (1) that the absence of all rights of this kind is referable to the fact that by the common law women have been excused from taking any part in public affairs.

In a subsequent case in the Court of Appeal in 1889, *Beresford Hope* v. *Lady Sandhurst* (2), the then Master of the Rolls, Lord Esher, concurs in the principle as stated by Willes J. He says that "by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function." It is not unworthy of notice that the words which Lord Esher employed as stating the general law are apparently the source of the language used by the draftsman of the Sex Disqualification (Removal) Act of 1919 as expressing the principle of law which that Act was to

(1) L. R. 4 C. P. 374. (2) 23 Q. B. D. 95.

repeal. Lord Esher was dealing with the question of the disability of a woman to sit in the London County Council. It is a disability analogous in its source to that which seems always to have obtained in the case of a seat in this House, and the principle is surely the same, the general disability which the law regarded as attaching to the exercise by women of public functions.

My Lords, the principle is no new one. For in the early years of the reign of James I. the question of the status of a peeress came before the Court of Star Chamber, in the case of the Countess of Rutland, who had been arrested under circumstances which would not have admitted of the arrest of any one with the full status of a peer. The Court, which contained Lord Chancellor Egerton, Popham and Gawdy C.JJ., and Fleming C.B. decided "that the person of one who is in law a countess by marriage or by descent is not to be arrested for debt or trespass; for although in respect of her sex she cannot sit in Parliament, yet she is a peer of the realm." The case is fully reported in Coke's Reports, Part 6, 52*a*. Your Lordships will observe that the disability to sit appears to be based by these judges on a general disability due to sex. It was by this time settled that the mere participation in status which marriage conferred was not in itself one which carried a title to sit. To have held otherwise would have been to have ignored that unity of the person which marriage imported under the common law of England, and to have enabled two persons to sit in respect of a single dignity. That, however, was not the point in the case.

If I am right in the construction I put on the statute, the real point in the case is whether this principle of general disability in the case of women is now completely repealed. For after some research I have been unable to find any foundation in our constitutional history for centuries past for the suggested existence of any restricted kind of peerage for women entitled in their own right different in the status it conferred from the ordinary kind conferring nobility on a man, in whose case the words introduced into the letters patent

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Viscount Haldane.

do no more than recognize his constitutional right as a noble to sit in the Upper House. I am unable to reconcile with our law, as it has become defined since the very obscure and uncertain period of the reign of the Plantagenets, the notion of a legally valid grant of another kind, conferring the same degree of nobility with the incidents withheld which are attached, not by the grant of the Sovereign, but by the law of our constitution. To concede that the Sovereign can introduce into a patent of peerage a denial of the right of a peer to sit in your Lordships' House would not only be to deny that the right to sit is a constitutional one, but would obviously mean that the King's Ministers can advise him to increase the peerage and compose the majority in this House as they please. Not less objectionable would be the principle that the Lords themselves should exercise a discretion in advising as to the granting or withholding writs. The only rational conclusion would seem to be that the holder of a peerage has a right to a writ unless disqualified by some known legal disqualification, such as infancy, or felony or bankruptcy, or what sex entailed prior to December 23, 1919.

It is well settled by the general law, and particularly by decisions of your Lordships' House, that the Crown cannot give to a dignity or honour a quality of descent unknown to the law: see the statements of Lord Chelmsford in the *Wiltes Peerage Case* (1) and of Lord Cairns in the *Buckhurst Peerage Case*. (2) That is because the prerogative cannot legally be exercised in such a fashion as to defeat the common law. If this be so, how can the Crown deprive the holder of a peerage of any right to sit which is conferred by law, as distinguished from prerogative grant depending on the discretion of the Crown? If a woman is no longer disqualified, she has surely a legal right to sit, in addition to the ordinary privileges of peerage which she has always enjoyed, such as the title to be tried by her peers, and, in former days at least, exemption from arrest in certain circumstances. For a distinction between dignities of different kinds according as the holder is a man or a woman I have failed, as I have

(1) L. R. 4 H. L. 153. (2) 2 App. Cas. 20.

said, to find any foundation. Thus the want of title to a summons prior to 1919 is difficult to attribute to anything else than to that general principle of disability which your Lordships' House joined in 1919 in declaring to be repealed.

My Lords, I cannot refrain from adding that I regret much that the desire of the Committee to give an immediate decision precluded us from having the benefit of the fully considered examination of the law and of the precedents and authorities which some of your Lordships who are learned in the laws of this country desired to make before any decision should be come to. And I fear that our failure to take time for consideration may somewhat impair the weight which those who will have, as pointed out in the *Wiltes Peerage Case* (ubi supra), full freedom hereafter again to consider this important question of constitutional principle, may attach to our deliberations on this occasion.

VISCOUNT CAVE. My Lords, I think that this petition should fail, and on grounds which can be stated in a few sentences. In my opinion the common law gave no right or title to a peeress to sit in this House, or to receive a summons for that purpose. It was not the case of her having a right which she could not exercise. I think she had no right; for I agree with my noble and learned friend, the Lord Chancellor, that a common law right to do something which the common law forbids to be done is a contradiction in terms. If this is so, then the patent certainly gave the petitioner no right to sit; and the Act of 1919, while it removed all disqualifications, did not purport to confer any right. If the right to sit in this House is to be conferred on peeresses it must be by express words. I think, therefore, that the Committee are right in advising against the prayer of the petition.

LORD DUNEDIN. My Lords, I was not able to give my vote at our recent meeting because, following my usual practice in judicial matters, I had not antecedently studied the question, and I wished to consult the numerous authorities

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Dunedin.

which had been cited. Having now had the opportunity of so doing, and believing it to be my duty to come to a conclusion on the matter which I was summoned to determine, I propose to state my opinion in as few words as I can.

I put aside all reference to what happened at the passing of the Act as regards amendments proposed and rejected; and I consider that the extract from the Journals of the House, tendered by the Attorney-General, fell to be rejected. I think it is well settled, and it would be mischievous to throw doubt on the doctrine, that in interpreting a statute you can only examine the statute itself and the state of the law at the passing thereof as that state can be gathered from other statutes, from judicial decisions and from writers of recognized legal authority in past times.

Considering the statute itself and the state of the law as so gathered, I find that there is at once presented a dilemma from which there is at first sight no easy extrication. To construe the general words as admitting the claim, is either to say that Parliament, which had, only the year previously, in a measure which enfranchised women for the Parliamentary vote, followed by another which made them eligible to sit in the House of Commons, provided in express terms that peeresses in their own right should have a vote for electing members to the Commons, was minded to provide that the same peeresses should also have a right to sit in the Lords—a double qualification enjoyed by no male peer; or else to say that Parliament, which had acted as aforesaid so recently, yet totally forgot to insert a repeal of that express clause. On the other hand, the words are doubtless of great generality and, on the mere interpretation of language, it is easy to say that to sit in the House of Lords is to exercise a public function. Had the matter remained there I do not quite know to what result I should have ultimately come. But the matter does not remain there. It is certain that the words of the Act only remove a disability; they do not create a right. Now we find that historically no one has ever been held to have a right to demand, ex debito justitiæ, a writ of summons to sit as a Lord of Parliament, except a male peer.

It is not as if a peeress had been in use to demand a writ and had been refused on the ground of sex. This historical fact in my view turns the scale in the balanced question of construction. Looking at the state of the matter historically, it seems to me that the Legislature, if wishing to confer the right on peeresses, would not have been content to use mere words of removal of disability, but would naturally have passed an enabling clause. In this view the patent is not, as the opposite argument would infer, an instrument which uses surplusage for one case and omits it for another, but is entirely consistent with the practice of the past, which it was not the intention of the statute to alter.

For these reasons, I am of opinion that the claim is not made out.

LORD ATKINSON. I have had the pleasure and advantage of reading the opinion delivered by my noble and learned friend, the Lord Chancellor. I thoroughly concur in it and I have nothing to add.

LORD WRENBURY. My Lords, as a member of the Committee for Privileges before which this case was first argued I approached the hearing on that occasion with the feeling that—as was obvious on reading the patent—Lady Rhondda's case was unarguable if it turned upon the language of the patent. If the right to sit in Parliament was a right which the Crown could grant or refuse, it was plain that the Crown had not granted that right to her, but, on the contrary, by omitting her name in the succession of persons who were to enjoy it, had refused it to her, and that she had not got it. After hearing the careful and exhaustive arguments which Mr. Talbot addressed to that Committee, I was convinced that the right to sit in Parliament could neither be granted nor refused by the King; that while it lay exclusively with the King to grant or not to grant the dignity, it remained that if he granted it, then there arose in the person ennobled a common law right consequent upon his nobility to sit and vote in the House of Nobles. It appeared to me to be

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Wrenbury.

constitutionally impossible to maintain that the King can at his will include or exclude a peer of the United Kingdom from the House of Lords any more than he can exclude a Member of Parliament elected by the people from the House of Commons.

At the conclusion of Mr. Talbot's argument before the first Committee, Sir Gordon Hewart, who was present as Attorney-General to assist the Committee, and whose duty it was to advance any argunent to combat Mr. Talbot's argument that suggested itself to him, addressed the Committee as follows: "My Lords, I find myself, if I may say so, very much in agreement with what has been urged before your Lordships by my learned friends, and there is very little for me to add, and I will not subtract from the effect of what they have said by following upon the same side. My Lords, the substantial question appears to be this: Once it is assumed or established that 'public function' within the meaning of s. 1 of the Act of 1919 includes the sitting and voting in Parliament, the substantial question appears to be whether this statute, by removing the disqualification, in the general terms in which it does, operates to remove the particular disqualification which has prevented peeresses in their own right from sitting and voting in your Lordships' House. My Lords, I cannot imagine any sound argument to the contrary of what is being asked by the petitioner. When one looks at the plain words of the Act, at the date of the Act, and at the legislation which had gone before, the conclusion would appear to be irresistible"; and subsequently: "Having regard to the plain words of this statute, and to the place which this statute fills in the history of legislation, I do not think it would be right for me to say, or to suggest, a word in contradiction of the argument of my learned friends."

In these circumstances, finding that the opinion which I had formed on hearing Mr. Talbot was one which the Attorney-General was not prepared to combat in argument, I found no occasion to ask that the case should be adjourned for further consideration. I should not have supposed, if the

Lord Chancellor had not told us so, that he would have found himself "bewildered," because at the subsequent hearing, under very different circumstances and when an acute difference of opinion had arisen, I, in common with others of your Lordships, desired that further consideration should be adjourned so that any member of the Committee who desired to do so might have an opportunity of expressing for the assistance of his colleagues a reasoned opinion before putting this question of law—for it is a pure question of law—to the vote. I thought it and think it my duty to form, however inadequately, an opinion upon this question of law and to offer it to my colleagues, leaving them to say how far, if at all, they obtain assistance from it. I recognize, however, that the vote having been taken and the matter decided so far as this Committee is concerned, the assistance, even if any is afforded, can on this occasion lead to no useful result.

When the House referred back the report of the Committee for Privileges for further consideration, I was prepared, of course, to reconsider the opinion I had formed and to come with an open mind to see whether Sir Ernest Pollock, as Attorney-General, had discovered and would advance an argument which Sir Gordon Hewart, as Attorney-General, could not find and did not advance. I have found in Sir Ernest Pollock's argument no considerations which influence me in any way to modify my previous opinion. He endeavoured to introduce some material which, for reasons which I will presently assign, was inadmissible, and raised some argument upon the statutes ch. 47 and ch. 64 of 1918, with which I will deal later, but in other respects he advanced nothing new. I shall first deal with the question for decision upon the broad grounds upon which I think it rests.

A peerage is an inalienable incorporeal hereditament created by the act of the Sovereign which, if and when he creates it, carries with it certain attributes which attach to it not by reason of any grant of those attributes by the Crown, but as essentially existing at common law by reason of the ennoblement created by the grant of the peerage.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Wrenbury.

The right to sit in Parliament is such an attribute. It is a right residing at common law in the person ennobled and exercisable by him unless for some reason he is disqualified from exercising it. The right to ennoble, which resides solely in the Crown, can be exercised only consistently with the common law, so that, for instance, the dignity cannot be made descendible in a course not known to the law. By parity of reasoning I think the dignity cannot be created so as not to carry with it attributes which the common law annexes to it. One of these is the right to sit in Parliament. This is not a right existent to-day and not existent to-morrow, ceasing to exist when an adult peer dies and is succeeded by a minor, coming again into existence when the minor attains his majority. The right exists during the minority, but is in abeyance because the minor has not attained his majority.

In the case of a man disqualification exists if he is a minor or if he is bankrupt. But the peerage with its attributes is nevertheless an incorporeal hereditament vested in him carrying the right to sit, and immediately the disqualification is removed, say, by the peer attaining his majority a writ of summons to Parliament can be obtained on petition of right ex debito justitiæ. I see no difference between the case of a peer who is a minor and who attains his majority and that of a peeress in her own right who was disqualified by sex and whose disqualification in that respect is removed by statute. It is said, and truly, that no case is to be found in which a peeress has presented her petition of right for a writ and has been refused. This creates in me no surprise, although I see that Lord Dunedin attaches importance to it. Of course a woman could not have succeeded in such an application because she was a woman, so why should she have applied ? But the right to demand a writ was the right not of a " male peer " but of a " peer " enforceable no doubt only by such a peer as was not disqualified. Whether the word " incapacity " or the word " disqualification " be used makes no difference. The woman was under incapacity because she was disqualified.

In early times the patent of nobility contained no words granting the right to sit, but the right nevertheless existed and was exercised. Later and for many years now it has been the practice to insert in the patent words of grant of the right to sit. It has also become the practice to insert other words purporting to confer the right to enjoy and use "all and singular the rights and privileges pre-eminences immunities and advantages to the degree of a Viscount or Viscountess [if that be the dignity granted] in all things duly and of right belonging which other Viscounts and Viscountesses . . . . have heretofore honourably and quietly used and enjoyed." As regards the words just quoted it is obvious that without any such words the man to whom the earlier words of the patent have granted a viscounty will of course and without more ado be entitled to use and enjoy the rights, etc., to the degree of a viscount belonging. In other words, the grant of these is, to used adjectives which Sir Gordon Hewart used at the previous hearing, purely otiose, mere surplusage. The same is, in my judgment, true of the words of grant of the right to sit. If they were not there, the right to sit would exist, because a viscount is, by virtue of his dignity, a peer of Parliament. Suppose the patent were to grant the right to sit to the first holder of the peerage only, and not to his heir male—or were to grant the right to sit for ten years or to sit in every alternate Parliament, no one of these would have any effect to curtail the common law right of the heir male to sit or of the grantee to sit after the ten years, or in every Parliament. The prerogative of the Crown does not extend to overrule the common law as to the rights of a subject ennobled. The Crown can ennoble or not ennoble a subject, but it cannot confer upon one who is not a peer the right to sit in the House of Lords, nor can it exclude from that House one who is. It is for your Lordships and for your Lordships alone to say whether the claimant has established that he is a peer of Parliament. If he is, his right to enter the House is established, unless he is under some disqualification. When a peerage is created it is not for the King to give or to take away the right to sit in Parliament. The

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Wrenbury.

peer is entitled to present his petition of right, and that petition must of necessity be referred to your Lordships' House, and it is for your Lordships, and for you alone, to say whether or not he is entitled to take his seat in your Lordships' House.

Applying these principles to the present case, I find that the Sovereign here created an incorporeal hereditament, having certain attributes, and that that hereditament comes to each person in succession named in the limitations, carrying with it the right of the holder for the time being of the dignity (unless disqualified) to sit in Parliament. At the date of the patent a woman was disqualified from sitting, but if and when the disqualification was removed she was entitled to assert that which she was theretofore disqualified from asserting—namely, that she was, by virtue of her dignity, a member of your Lordships' House. I see no distinction whatever between the minor attaining his majority and the woman whose disqualification is removed by statute.

With this short statement of my opinion upon the attributes of a peerage, I turn to consider the Sex Disqualification (Removal) Act, 1919. Is it possible to doubt that when your Lordships are sitting in a legislative capacity you are "exercising a public function"?

When the House is sitting judicially, no one could dispute that, in reviewing the decision of a Court of law it is exercising the function of reversing, if the case so requires, the decision of a public Court clothed with the power of making orders which are binding upon the parties before it. When the House rises at 3.45 from the exercise of its judicial function, and resumes at 4.15 for legislative business, is it possible to contend that it has ceased to exercise a function, or that its function is not public? Its legislative action is surely if anything more, not less, public than its judicial action. It seems to me quite impossible to contend the contrary. I can find nothing in the statute, reading it from one end to the other, to confine or curtail the perfect generality of the words "any public function." It is, to my mind, inadmissible to say that this particular function

is so important that it cannot be affected except by express words referring to it. Unless, upon true principles of construction, there is something to exclude it from the general words, it is included in them, however important it may be.

In construing the Act, however, it must, of course, be borne in mind that complete generality is not necessarily to be attributed to general words. The limitations upon a proposition of that kind are best found, I think, in the masterly judgment of Turner L.J. in *Hawkins* v. *Gathercole*. (1) The dominant purpose in construing a statute is to ascertain the intent of the Legislature, and this may be done in any one of three ways. First, by considering the cause and necessity of the Act. Secondly, by comparing one part of the Act with another; and, Thirdly (and this is the most indefinite) sometimes by foreign (meaning extraneous) aids "so far as they can justly be considered to throw light upon the subject." All of these, according to the language in *Stradling* v. *Morgan* (2), are governed by the words "so that they (the Judges) have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion." An excellent illustration is afforded by *Chorlton* v. *Lings* (3), where two points were decided—namely: (1.) that women were subject to a legal incapacity from voting at the election of members of Parliament (a point which covered the case apart from the other point); and (2.) that notwithstanding Lord Brougham's Act (13 & 14 Vict. c. 21, s. 4), "man," in the Representation of the People Act, 1867, s. 3, did not include "woman." If *Hawkins* v. *Gathercole* (1) and *Chorlton* v. *Lings* (3) are carefully examined, it will be found that the judges never allowed their attention to be diverted from the language of the Act itself—e.g., Turner L.J., at p. 22, dwells upon the fact that "rectories" are, and "vicarages" are not, mentioned, and holds that "having regard to the purposes and context of the Act," the latter do not fall within the Act; from p. 24 to

(1) 6 D. M. & G. 1. (2) Plowd. 205.
(3) L. R. 4 C. P. 374.

H. L. (E.) 1922.

VISCOUNTESS RHONDDA'S CLAIM.

Lord Wrenbury.

p. 28 he seeks to collect the intention of the Legislature by comparing the several parts of the Act. So in *Chorlton* v. *Lings* (1) the ratio decidendi lay in holding that the Act was dealing with qualification to vote, not with identification of the persons who were to vote (see pp. 386, 388), and that having regard to another statute in pari materia "man" meant "male person," and that the words "male person" expressly (within Lord Brougham's Act) excluded "female person."

My Lords, when with the guidance of these authorities I apply my mind to the Act here in question, I cannot under the second head above stated find anything which, in any other part of the Act, qualifies or controls in any way the words "exercise any public function." If I turn my attention to the first head, I trace the "cause and necessity of the Act" to the long and acute struggle of women to obtain the political and civil equality with men which they asserted to be their due. The considerations under this head point rather to complete equality of men and women, that is to absolute generality in the meaning of the words than to any exception of one particular political or civil privilege on the ground that it is so great and so important a privilege that it is sacrosanct from being included in any general words. Mr. Talbot was, in my opinion, justified in calling this "revolutionary legislation." If I seek for "foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject," I have not heard and do not know of any such circumstances unless they consist in introducing an investigation into that which passed in Parliament when the Act was passed.

The Attorney-General tendered as evidence to be considered by the Committee an entry in the Journals of your Lordships' House of November 11, 1919, p. 432. The Attorney-General did not and could not dispute that it is well settled that in construing a statute regard must be had to the language of the statute, and to that alone, assisted by a knowledge of the state of the law at the date it was passed and the intent to be gathered from the statute itself

(1) L. R. 4 C. P. 374.

of an alteration in the law. But he sought to say that an entry in the Journals did not fall within that principle. The contention is, in my judgment, unsound. The debate upon the Bill, the fate of amendments proposed and dealt with in committee in either House, cannot be referred to to assist in construing the language of the Act as ultimately passed into law with the Royal Assent. The passage cited by Lord Haldane from *Millar* v. *Taylor* (1) is plain authority for this. "The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House, or to the Sovereign." An entry in the Journals is no more than a record of the result of debate or of proceedings in the House to which it relates. Neither the debate nor the outcome of the debate is admissible to explain the words which are found in the Act as passed. The Attorney-General referred in support of his contention to some expressions of Lord Hatherley in *Hebbert* v. *Purchas*. (2) If the passage be studied, however, it will be found that Lord Hatherley did not refer to the Journals as material upon which he relied in forming his opinion on the question of construction. He uses the verb "illustrates." The view which he expresses upon the construction of the Act of Uniformity upon "the strictness of its provisions" is arrived at independently and is not based upon that which follows. The passage which he cites from the Journals, he says, "illustrates this"—i.e., illustrates a meaning of the Act at which he has arrived independently.

I have thought it necessary to make these observations, but there is another ground upon which the evidence which the Attorney-General tendered under this head is in the present case necessarily to be excluded. It is this. Mr. Talbot stated emphatically that he disputed the admissibility of this evidence, and asked to be heard upon the point if the Committee were disposed to admit it. He was not called upon to argue the point. The Committee did not give—

(1) 4 Burr. 2332. (2) L. R. 3 P. C. 605, 648.

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Wrenbury.

although in my judgment it ought to have given—an express ruling upon the point. But it certainly did so inferentially. Under these circumstances, the evidence of the Journals is in any case inadmissible.

Only one matter remains. Reference was made, and quite legitimately made, to s. 9, sub-s. 5, of the Representation of the People Act, 1918, ch. 64, and to the Act of 1918, ch. 47, which provided that women should not be disqualified by sex or marriage from sitting in the House of Commons. I have to see whether, having regard to those which were subsisting enactments when the Act under review was passed, and which the Legislature must be taken to have known and have had in mind, I must infer that the Legislature cannot have intended that by virtue of general words in this Act a person should become entitled to sit in your Lordships' House. If so, I ought to restrict the generality of the words. I have to look for an inconsistency. Suppose all the provisions were included in one and the same Act, what inconsistency is there in saying: "A woman shall not, by reason of sex or marriage, be under incapacity to vote at an election for the House of Commons or to sit in the House of Commons, or to sit in the House of Lords"? It may be improbable—it may be thought improvident—but there is nothing inconsistent in so enacting. Whether, after this legislation, a woman (if she be a peeress) can claim the right to enjoy all these privileges concurrently is another matter, and would involve the consideration of matters which are not relevant to the present question.

What is there, then, to exclude the operation of the Sex Disqualification (Removal) Act upon Lady Rhondda's position? She is the present holder of a peerage descendible in succession under limitations which include a female. She is not disqualified from exercising any public function which a holder of the peerage is entitled to exercise. To sit and vote in Parliament is such a public function. In my opinion, she is entitled to succeed on this petition.

The majority of your Lordships being of a contrary opinion, this view will not prevail. It remains, however, that in

no Court of justice from the lowest to the highest, including your Lordships' House, can this case hereafter be cited as any authority upon the proper construction of the statute. This Committee is a mixed tribunal of laymen and of those generally styled "learned in the law." The former did not, before giving their vote, even wait to receive such assistance as their legal colleagues could give them in applying the law to that which is a purely legal question. The opinions which some of your Lordships have expressed will no doubt be read hereafter with the respect and consideration which is their due, but no judge will be bound to follow the present case as any authority upon the true construction of the Sex Disqualification (Removal) Act, 1919.

Since writing and before revising the above, I have received and read the speech or judgment which the Lord Chancellor has delivered in this matter. In common, I expect, with others of your Lordships, I regret that the opinions there expressed, and the opinions expressed by others of your Lordships who have written in the matter, were not before the Committee, including myself, before a vote was taken upon this question of law. I entirely concur with what Lord Haldane has said on this point. But, belated as is the opportunity which I have had of learning the grounds upon which the Lord Chancellor bases his opinion, I have considered with every care the arguments upon which he rests his conclusion. I have only to say that I cannot concur in his view. I adhere to the opinion I have expressed, and still think, that Sir Gordon Hewart was right when at the first Committee he said that which is quoted above.

LORD MUIR MACKENZIE. My Lords, this is a lay tribunal, and I trust that an expression of opinion by one who is not a Lord of Appeal will not be thought out of place.

On this occasion we are called upon to give the reasons for our votes the other day. I was prepared to give then and there the short reasons which, as a layman, I now submit to the Committee.

The claim is for the issue of a writ of summons. The

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Muir Mackenzie.

claimant put forward the letters patent under which the right (if any) accrues. The patent is in usual form : I might say statutory form, for it can only be altered by Order in Council under the Crown Office Act, 1877. It expresses the grant to Viscount Rhondda and his male successors, through his daughter, Lady Rhondda, amongst other things, of a seat, place and voice in the Upper House of Parliament. These words may not have been always used in ancient documents, but they have appeared in all patents of peerage for more than 200 years. Incidentally, I noticed an obiter dictum suggesting that these words were used through loose practice in the Crown Office. I do not think that could refer to the last forty years ; before that time every draft was signed by the Attorney-General. It is true that in documents handed down from generation to generation, a sort of sacrosanctity attaches to words which from the beginning have had no substance, but I say that these words are apt, descriptive and effective. They sufficiently and appropriately convey the royal grant, and are the foundation of the Writ of Summons. It is because the King has granted a seat, place and voice that the peer is entitled to a summons, in order that he may take his seat and use his voice.

In the patent produced before the Committee there is no such grant to the claimant ; on the contrary, the claimant is expressly passed over.

The next step in the claim is to put forward the Sex Disqualification (Removal) Act. Is there anything in that Act about a seat in your Lordships' House or the issue of a writ ? I can see nothing of the kind. The Act is one for removing disqualification, not for creating a novel constitutional right.

My Lords, that is an end of the case, as far as I am concerned ; but I beg leave to refer to two points which were treated as important at the hearing. As to the expression " public function " it is idle to tell a Committee of your Lordships' House that " public function " in that Act of Parliament comprised sitting in the House of Lords. The Lords sitting in this Committee know that in this House (and in the other House) the words had no such meaning. For my

own part, I think that the words do not bear that meaning in natural construction, and are with such a meaning repugnant to the context. I saw the other day a statement that at some small place in Cornwall, for the first time, a woman had been appointed town crier; that is the sort of thing which the general words cover.

The other point to which I would refer is one which arose but was not pressed for determination. I mean as to whether the res gestæ in Parliament could be taken into consideration in construing the Act of Parliament. Noble and learned Lords were naturally sensitive on this subject, which invaded well established rules governing their practice on appeals. But this is not an appeal; it involves, I venture to say, a reductio ad absurdum, and is absolutely futile, to tell the very peers who passed the Act a short time ago that their declared intention and the construction on which they proceeded is not to weigh with them. This little touch of nature in the Committee does not affect at all the legal doctrine binding judges who are not the makers of the law.

My Lords, I have read with great interest and respect the written opinions of noble and learned Lords which have been circulated. If we lay peers had to rely on the legal advice of our judicial colleagues, we should be in no slight perplexity. But we have already given our votes, and I have stated what led me to give my vote against the claim.

LORD PHILLIMORE. My Lords, I was a member of the first Committee that sat in this matter, and I concurred, though after hesitation and much regret that we had not a fuller argument, with the majority in a recommendation favourable to the claim of Lady Rhondda.

When the matter came before the larger Committee I was one of those who voted against an immediate decision; and when your Lordships determined upon an immediate decision, I felt unable to express at the moment my concluded opinion.

I think, therefore, that I ought to tell your Lordships that, upon mature consideration and after perusing the printed

H. L. (E.) 1922

VISCOUNTESS RHONDDA'S CLAIM.

Lord Phillimore.

reasons of other noble and learned Lords, I now agree with the majority of your Lordships that Lady Rhondda has not made out her claim.

My reasons, however, for such an agreement are strictly limited.

I express no opinion, nor even a tendency to an opinion, as to the admissibility or otherwise of the proceedings of this House upon the stages of the Bill before it passed into an Act. It became unnecessary for your Lordships to come to any conclusion upon this subject, and counsel for Lady Rhondda were relieved by your Lordships from arguing the point.

I am not influenced by the argument derived from the language of the patent. The law being as it was when the patent of peerage was conferred upon Lady Rhondda's father, the provisions could not be expressed in other language. It would have been a mockery to profess to give Lady Rhondda a seat, place, and voice in Parliament.

Nor am I impressed by the fact that the words of the statute are so expressed as to purport to remove a disqualification rather than to confer a qualification. The Parliament (Qualification of Women) Act, 1918, which enables women to sit in the House of Commons gives a qualification in the same way by saying that a woman shall not be disqualified. It may be illogical, but it is so expressed.

My first ground for deciding against the claim is this. It may well be said that the constitutional doctrine established in the *Earl of Bristol's Case* was established only for male peers, and that no peeress can rely upon it as entitling her to a writ of summons. A constitutional doctrine established by usage extends only as far as the usage carries it, and I think that it is not legitimate to make use of a doctrine so established as a starting point for arguments by way of analogy. Lady Rhondda claims her seat as of right, and the Crown has, as I understand it, referred it to us to advise whether she can claim it by right. This would be answer enough in the present case. But if the decision were to be rested upon this ground, it would leave it open to the Crown, if so advised, to issue a writ of summons to her or to any other peeress. This would

leave the law in an unfortunate position, and I turn, therefore, to my second ground.

Upon the whole, and after reflection, I think that it would not be right to give to the general words of the statute, followed as they are by words of particular application, the incidental effect of creating this important right. I adopt for this purpose the reasoning of the noble and learned Lord the Lord Chancellor. But I should like to add two considerations.

(1.) The statute says there shall be no disqualification by reason of marriage, and it applies to both sexes. Could it be said that if the statutes of a college or the terms of an appointment provide that a Fellow intended to be resident within the walls of a college and to discharge college offices should be unmarried, he could claim by virtue of this statute to marry and keep his Fellowship ? Or that the female head of some charitable trust for girls residing within the walls of her establishment, who was required by the terms of her appointment to be unmarried, could claim to marry and introduce her husband ?

(2.) Again, the statute, if full effect is to be given to its general language, applies to both sexes. Can it be said that it would enable a man to hold the office and discharge the public functions of a matron of a workhouse or of Mistress of the Robes ?

LORD RIDDELL. My Lords, I have listened with respect and admiration to the learned and exhaustive judgments delivered by the legal members of the Committee, but I desire to rest my opinion upon the plain ground that it is inconceivable that Parliament should have made such a wide and far-reaching constitutional change by general words of vague and doubtful import. The Sex Disqualification (Removal) Act deals with juries, solicitors, students, and teachers with meticulous care. Had the intention been to confer the important right now claimed, surely Parliament would have inserted an express provision to that effect.

There is one other point. In order to avoid misapprehension I think it well to say that the Committee are not concerned

H. L. (E.) 1922 VISCOUNTESS RHONDDA'S CLAIM.

with the desirability or otherwise of admitting peeresses to this House. The sole function of the Committee is to decide whether the Sex Disqualification (Removal) Act removes the disability. For the reasons given I am of opinion that it does not.

EARL DONOUGHMORE. My Lords, I have to inform your Lordships that the noble and learned Lords Lord Buckmaster, Lord Sumner, and Lord Carson have asked that the announcement should be made that they concur in the judgment delivered by the noble and learned Viscount, the Lord Chancellor.

Agents for the petitioner: *Ingledew, Davies, Sanders & Brown, for Ingledew & Sons, Cardiff.*

Agent for the Crown: *Henry Cooke, for Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *June* 26.

ARAMAYO FRANCKE MINES, LIMITED, APPELLANTS;

AND

PUBLIC TRUSTEE . . . . . RESPONDENT.

Alien Enemy—War—Declaration of—Company—Foreign Assets—Enemy Shareholders—Dividend—Conditions of Payment—Vesting Order—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 2, *sub-s.* 1; *s.* 4, *sub-s.* 1.

An English company had certain alien enemy shareholders and certain assets in Germany. From time to time after the outbreak of the war with Germany resolutions were passed by the directors and by the company in general meeting declaring interim and final dividends respectively, subject in each case to a condition that as regards members of the company resident in Germany, Austria and Turkey, the dividend should be payable only out of assets in Germany, and as regards members resident elsewhere out of assets in England.

The Enemy Trading Amendment Act, 1914, by s. 2, sub-s. 1, provided that any sum which, had a state of war not existed, would have been payable to any enemy by way of dividends should be paid by the company to the custodian appointed by the Act, and, by s. 4, sub-s. 1, empowered the Court by order to vest enemy property in the custodian.

By an order made on August 24, 1916, under s. 4, sub-s. 1, it was

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD WRENBURY, and LORD CARSON.

ordered that the right to transfer the shares held by alien enemies and to receive any dividends "now due and to accrue due thereon" vested in the custodian, and the shares were transferred into his name in due course:—

Held, that the resolutions, so far as they provided for payment only out of assets in Germany, were void as against the custodian, and that the company was liable out of any assets in its hands to pay him the amounts of the dividends, whether declared before or after the vesting order.

Decision of the Court of Appeal [1921] 1 Ch. 675 affirmed.

APPEAL from an order of the Court of Appeal affirming two orders of Russell J. (1), whereby the appellant company was ordered to pay to the respondent, the Public Trustee, as custodian of enemy property for England and Wales under the Trading with the Enemy Amendment Act, 1914, the sum of 119,738*l.* 8*s.* 9*d.* being the dividends payable during the years 1915 to 1919 inclusive in respect of certain shares of the appellant company held by alien enemies and the sum of 1934*l.* 17*s.* 7*d.* being the principal moneys and interest thereon payable in respect of certain debentures of the company also held by alien enemies.

The facts are fully stated in the report of the case before Russell J. and the Court of Appeal, and sufficiently appear from the judgment of Lord Buckmaster.

The arguments on behalf of the appellants were the same as in the Court of Appeal and need not be repeated.

Manning K.C. and *Edwardes Jones* for the appellants.

Clauson K.C. and *Gavin Simonds* for the respondent were not called on.

LORD BUCKMASTER. My Lords, in October of 1906 the appellant company was incorporated in England, having a capital of 500,000*l.* increased in 1909 to 600,000*l.* divided into 1*l.* shares. 500,000*l.* of that capital was issued. The company had been formed for the purpose of acquiring and working certain mineral rights in Bolivia, the most important of which related to tin, bismuth and wolfram. With regard to the bismuth and wolfram, it was the habit of the company to have these ores treated in the first place in Germany,

(1) [1921] 1 Ch. 675.

H. L. (E.) 1922

ARAMAYO FRANCKE MINES, LD. v. PUBLIC TRUSTEE.

Lord Buckmaster.

and then the products were dealt with either in this country or in Germany when they had been refined. War broke out between this country and Germany on August 4, 1914, and on November 27, 1914 a statute came into operation which was known as the Trading with the Enemy Amendment Act, 1914. It was a statute designed to prevent the payment by debtors in this country of money to any enemy subject and to arrest, as far as possible, all commercial intercourse between the two countries. For the purpose of effecting that object it was provided by s. 1 that a person should be appointed by the Board of Trade who was to act as a custodian of enemy property, his duties being stated to be those of receiving, holding, preserving and dealing with the property in pursuance of the statute. Sect. 2, sub-s. 1, stated that: "Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the custodian" who was to hold it subject to the provisions of the statute, and sub-s. 3 of the same section imposed the liability of a fine and imprisonment on any person who failed to make the payment that had been specified in the earlier parts of the section. Sect. 4 of the same statute enabled a vesting order to be made vesting in the custodian the real and personal property belonging to an enemy and conferring upon him the necessary powers of sale and management. It is only necessary to add that the definition of the word "enemy" as contained in the statute was that of a person resident or carrying on business in any country with which His Majesty was for the time being at war.

On January 27, 1915, the directors of the company, who had the power under the Articles to declare an interim dividend, resolved in terms that "An interim dividend of sixpence per share free of income tax be and is hereby declared," and they attached to that declaration certain conditions which, in the words of the resolution itself, were the conditions subject to and upon which the declaration was made. Those conditions one and all referred to the

method by which the dividend was to be paid. The first provided that it was to be paid on February 1, 1915, and the second and the third provided that as regards the members of the company who were resident in Germany, Austria and Turkey the dividend was to be payable only out of the assets of the company in Germany, and that as regards other members the dividends were to be payable out of the assets in this country. From time to time similar resolutions were passed by the directors and by the company in general meeting, dealing in the one place with interim and in the other with final dividends, the last apparently being in October of 1919, and under and by virtue of these resolutions a sum of money amounting to about 119,000*l.* was in fact obtained by the enemy shareholders out of the property in Germany in satisfaction of their dividends. The present appeal relates to a claim that has been made by the custodian trustee for repayment of that sum by the company and for the further payment of some 1924*l.*, which represents moneys appropriated in 1915 and 1916 out of assets in Germany by two debenture holders resident there in satisfaction of two debentures for 1000*l.* and 800*l.* and interest thereon.

After this process of declaring dividends had begun—namely, on August 24, 1916—an order was obtained by the custodian trustee vesting these shares and debentures in him under the statute, and on March 12, 1917, the name of the trustee was entered in the register of the company as the registered holder of the shares. The 119,000*l.* to which I have referred was divided up as follows: a sum of 89,000*l.* odd was paid after the vesting order had been made and the balance before. In the view that I take of this matter there really is no difference between the one period and the other, but as different arguments have been used with regard to those different periods I have thought it well to show the way in which the sum was in fact divided. It is contended on behalf of the appellants that there is no right whatever in the custodian trustee to any part of either of these sums of money, because either the conditions that were attached to the resolutions for payment were good and they were at

H. L. (E.) 1922

ARAMAYO FRANCKE MINES, LD. v. PUBLIC TRUSTEE.

Lord Buckmaster.

liberty to permit the enemy shareholders to satisfy the debt owing by the English company out of the foreign assets, or, if they were bad, the whole declaration of dividend was bad throughout, there consequently was never any declaration of dividend, and no debt is due from the company to the custodian trustee. I will not pause to consider what the ultimate effect might be upon the directors of the company if the latter branch of this argument found favour in your Lordships' minds, because I think it is founded upon a mistaken view of these resolutions. In truth, the company did in plain terms declare a dividend, and it was that, and that only, that was within the competence either of the directors or of the company. The conditions which were attached, except the one as to the date of payment, are conditions which there was no power whatever to make effective, but, although they have purported to make these conditions of the declaration of dividend, their addition has not affected the fact that the dividend was declared. It has merely attempted to impose upon the method by which the liability thereby created was to be discharged conditions on which it is impossible for the company to rely. It is therefore my clear opinion that all these dividends were actually declared, and it results that from their declaration at their various respective dates there were debts that arose from the company to the various shareholders, including those who may be referred to as the enemy shareholders.

In that view it is then urged that even in that case there would be no claim whatever that the custodian trustee could make until a vesting order had been made vesting the property in him under s. 4. My Lords, I have failed to understand how that argument gives full effect to the meaning of s. 2. The purpose of the statute as defined on its face is to prevent the payment of money to persons and bodies of persons who are resident abroad in enemy countries, and s. 2 expressly contemplates that dividends may be payable to such persons and that such payment is to be stopped; as from the passage of this Act dividends are not to be paid to or for the benefit of an enemy, but they shall be paid to the

custodian, who is to hold them in the manner which the Act directs. I agree with the Court of Appeal in thinking that the section creates no new obligation whatever; it simply provides that an existing obligation measured in terms of money cannot be discharged to a person who at the time when the Act was passed would have had a right to release it, but such moneys must from the passage of the Act be paid to the custodian trustee, who, and who alone, is able to give a receipt for their payment.

It is then said that, even if that were the case, the fact that he was not paid would only enable the custodian trustee to take the penal proceedings which are provided by sub-s. 3 of s. 2 of the Act, and that he has no right whatever to obtain payment of the money if the person who owes the money thinks fit to withhold it. For the purpose of supporting that argument, the well-known case of *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) containing the judgment of Willes J. is invoked, where it is pointed out that, if an Act creates a special obligation and imposes procedure for its enforcement or penalties for its breach that procedure and those penalties are alone the remedy of the person injured by disregard of the statutory duties. It appears to me that that has no relationship to this case at all. This is a case where an existing legal debt capable of being enforced in the Courts in this country is by statute transferred from the person who had that right when the Act was passed to the custodian trustee, and the subsequent provisions with regard to punishment are merely introduced for the purpose of adding to the liability for payment which still exists the punishment of fine and imprisonment if any attempt is made to disregard provisions set up to avoid payment being made to people with whom we were then at war. So far as the debentures are concerned it is only necessary to add that the Trading with the Enemy Act, 1915, renders precisely the same reasoning applicable to them also. That appears to me to dispose of the whole case, and it leaves untouched, and indeed unnecessary to decide, another question which might have arisen

(1) (1859) 6 C. B. (N. S.) 336, 356.

H. L. (E.) 1922

ARAMAYO FRANCKE MINES, LD. v. PUBLIC TRUSTEE.

Lord Buckmaster

on a different interpretation with regard to the changed position as between the date after and the date before the vesting order.

The only other matter to which I need make reference is the argument which has been advanced with regard to acquiescence. It is indeed only out of consideration for counsel that I think it worth while to introduce that question to your Lordships' notice. It is suggested that, as the custodian trustee knew that notwithstanding his protests these dividends were in fact being dealt with in the manner that I have mentioned and took no steps to interfere, such conduct now prevents him from asserting what, upon the view of the statute as I have interpreted it, is his undoubted legal right. My Lords, I am unaware of any doctrine of law which enables a debt to be liquidated by the mere process of the creditor lying by and taking no steps to secure recovery, unless indeed he lies by beyond the period of time imposed by the Statute of Limitations. Even if the debtor mistakenly pays the debt to somebody else, to the knowledge of the creditor, that cannot possibly affect the legal right that the creditor possesses, a right which cannot be taken away from him except by payment or release, or by something equivalent thereto in the eyes of the law.

For these reasons, my Lords, I am of opinion that this appeal should fail and be dismissed with costs.

LORD ATKINSON. My Lords, I concur.

LORD WRENBURY. My Lords, I agree.

LORD CARSON. My Lords, I also concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 26, 1922.

Solicitors for the appellants : *Dale & Co.*

Solicitors for the respondent : *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

DAWSONS, LIMITED . . . . . APPELLANTS; H. L. (Sc.)* 1922 July 14.

AND

BONNIN AND OTHERS . . . . . RESPONDENTS.

Insurance (Fire)—Untrue Answer to Question in Proposal Form—Proposal made the Basis of the Contract—Warranty—Condition.

A firm of contractors in Glasgow insured a motor lorry at Lloyd's against damage by fire and third party risks. The policy recited that the proposal should be the basis of the contract and be held as incorporated in the policy, and it was expressed to be granted subject to the conditions at the back thereof. By the fourth condition, "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." In reply to a question in the proposal form, "State full address at which the vehicle will usually be garaged," the answer given was "Above Address," meaning thereby the firm's ordinary place of business in Glasgow. This was not true, as the lorry was usually garaged at a farm on the outskirts of Glasgow. The inaccurate answer in the proposal was given by inadvertence. The lorry having been destroyed by fire at the garage, the insured claimed payment under the policy:—

Held, (1.) that the misstatement in the proposal was not material within the meaning of condition 4; but (2.) (by Viscount Haldane, Viscount Cave, and Lord Dunedin; Viscount Finlay and Lord Wrenbury dissenting) that the recital in the policy that the proposal should be the basis of the contract made the truth of the statements contained in the proposal, apart from the question of materiality, a condition of the liability of the insurers; that the effect of this recital was not cut down by the special conditions on the back of the policy; and that the claim failed.

Interlocutor of the Second Division of the Court of Session in Scotland, 1921 S. C. 511, affirmed with a variation.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland adhering to an interlocutor of the Lord Ordinary subject to a variation. (1)

The appellants were general contractors having their chief office at 46 Cadogan Street, Glasgow. The respondents were underwriters at Lloyd's.

The action was brought on September 25, 1919, by the appellants against the respondents to recover the sum of 500*l.* on a policy of insurance issued by the respondents to

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD WRENBURY.

(1) 1921 S. C. 511.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN.

the appellants on February 8, 1917, whereby a motor lorry used by the appellants in their business was insured against loss by fire to the amount of 500*l.* and against claims by the public up to 1000*l.*

The appellants were induced to insure their motor lorry with the respondents by a Mr. Hamilton, a local insurance agent. On January 22, 1917, the appellants' secretary signed a proposal form which required a series of particulars to be filled up by or for the proposer. These particulars were filled up by Hamilton in the presence of the secretary. As signed the proposal contained (inter alia) the following filled-up particulars: "1. Proposer's name—Dawsons, Ltd. 2. Proposer's address—46 Cadogan Street, Glasgow. . . . . 4. State full address at which the vehicles will usually be garaged—Above address."

There was no accommodation for motor lorries at 46 Cadogan Street and the lorry was in fact garaged in the appellants' garage at Dovehill Farm, Newlands, on the outskirts of Glasgow. When the secretary signed the proposal he did not notice that the answer to question 4 was inaccurate.

The proposal was accepted and on February 8, 1919, the respondents issued a policy of insurance to the appellants to the effect above stated. The policy in its introductory clause contained the following parenthetical clause: "Which proposal shall be the basis of this contract and be held as incorporated herein"; and it was expressed to be granted subject to the conditions on the back thereof, the due observance of which was stated to be a condition precedent to all liability of the underwriters thereunder. Condition 4 was as follows: "Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

On December 27, 1917, the lorry was totally destroyed by fire at the garage at Dovehill. The appellants made a claim against the respondents under the policy, but the respondents repudiated liability.

This action was then brought.

The respondents pleaded (inter alia) as follows: 1. That the policy was void, because of the untrue answer given to the question in the proposal and because the information contained in said answer was material to the formation of the contract and misled the respondents on a material matter; 3. that the appellants, having made a claim based on false and misleading statements for loss under said policy, were barred under condition 4 of the policy and at common law from pursuing the action; 4. that, the proposal of the appellants being false and misleading with reference to the place where the insured motor car would be garaged, the respondents were entitled to absolvitor.

The Lord Ordinary (Lord Anderson) was of opinion that the recital in the policy that the proposal should be the basis of the contract imported a warranty of the truth of the statements contained in the proposal and that he was therefore absolved from considering the question of the materiality of the statements, and he assoilzied the respondents from the conclusions of the summons. The Second Division (the Lord Justice-Clerk, Lord Dundas and Lord Ormidale) arrived at substantially the same result, but on different grounds, and they based their judgment on the fourth condition.

May 9, 11, 12, 15. *Morrice Mackay K.C.* (with him *T. A. Gentles K.C.* and *W. D. Patrick*) (all of the Scottish Bar) for the appellants. The Lord Ordinary proceeded on the view that a provision in a policy of insurance that the proposal shall be the basis of the contract imports an implied warranty of the truth of the statements contained in the proposal form, and that he was therefore absolved from considering the materiality of the misrepresentation complained of. But this proposition is not borne out by the authorities which he cited in support of it. This proposal form is unusual in that it contains no declaration to be signed by the assured that the statements made therein are true and no warranty of the truth of those statements. In *Thomson* v. *Weems* (1) not only was there such a declaration, but there was an

(1) (1884) 9 App. Cas. 671, 684, 687.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN.

express stipulation that if any untrue statement was made the policy should be void and the premiums forfeited. The mere use of the word " basis " is not enough to create a warranty ; and if the words used in a policy are ambiguous they must be construed contra proferentes and in favour of the assured. In *Yorkshire Insurance Co.* v. *Campbell* (1) there was an express warranty of the truth of the statement challenged and inferentially that case shows that to create a warranty it is not enough to incorporate the proposal in the policy and make it the basis of the contract, otherwise it would not have been necessary for Lord Sumner, who delivered the judgment of the Judicial Committee, to discuss the materiality of the misstatement. In *Anderson* v. *Fitzgerald* (2) Parke B., in giving the opinion of the judges who were summoned to assist the House, went entirely on the express proviso of nullity, and this view was adopted by Lord Cranworth and Lord Brougham. *Macdonald* v. *Law Union Insurance Co.* (3) also proceeded upon the specific proviso, and Blackburn J. there discusses *Wheelton* v. *Hardisty* (4), which caused this proviso as to nullity to appear in policies. It was held in the last cited case that, because the truth of the statements in the proposal was not made a condition precedent to the liability of the insurers, a plea that a statement in the proposal was untrue was bad. In *London Assurance* v. *Mansel* (5) it was held that there was a material concealment, but incidentally Jessel M.R. cites *Anderson* v. *Fitzgerald* (2) for a proposition which it does not support. *In re Marshall and Scottish Employers' Liability, &c., Insurance Co.* (6) also proceeded upon the proviso for nullity. These cases therefore are not opposed to the appellants' contention. On the other hand the decision of the Supreme Court in Victoria in *Dalgety & Co.* v. *Australian Mutual Provident Society* (7) is a direct authority that a declaration in a proposal that the statements contained therein shall be made the basis of the contract does not amount to a warranty. Again in

(1) [1917] A. C. 218.
(2) (1853) 4 H. L. C. 484.
(3) (1874) L. R. 9 Q. B. 328.
(4) (1857) 8 E. & B. 232, 299.
(5) (1879) 11 Ch. D. 363, 371.
(6) (1901) 85 L. T. 757.
(7) (1908) Vict. L. R. 481, 502 ; 1 Stone's Insce. Cas. 177.

Life Association of Scotland v. *Foster* (1) it was held that an agreement in a proposal that the declarations therein contained should be the basis of the contract did not import a warranty, and emphasis was laid on the contra proferentem rule. The answer to the question as to the place of garage formed no part of the subject of the risk, and condition 4, upon which the Second Division founded their judgment, has no application. But the statement in the policy that it is issued subject to special conditions, the due observance of which is a condition precedent to the liability of the underwriters, involves that other inaccuracies, apart from the question of materiality, should not have the consequence ofavoiding the policy.

Roberton Christie K.C. (with him *W. Ingram*) (both of the Scottish Bar) for the respondents. The recital in the policy that the proposal shall be the basis of the contract imports a warranty of the truth of the statements in answer to the questions in the proposal, and the legal effect is that the contract is avoided if any of those answers are untrue, the materiality of the answers being presumed and not being disputable. There is no declaration under the hand of the assured in terms of which he so contracts, but the acceptance of the policy has the same legal consequence. He cannot claim the benefit of the policy while refusing effect to its terms and provisions as a whole. The basic character attaching to the statements in the proposal is not affected by the special conditions appended to the policy. Condition 4 extends to representations of material facts bearing on premium or claims. These are matters which need not be contained in the proposal at all. Alternatively the misstatement complained of is struck at by the condition, inasmuch as it was a statement material to assessing the premium and material also to the consideration of whether or not the risk should be undertaken at all. In *Anderson* v. *Fitzgerald* (2) Lord St. Leonards bases his judgment on the fact that the truth of the statements in the proposal was made the basis of the contract. In *Thomson* v. *Weems* (3) Lord Blackburn says

(1) (1873) 11 M. 351, 358, 364. (2) 4 H. L. C. 484.
(3) 9 App. Cas. 671, 684, 689.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN.

that where the proposal is made the basis of the policy it is hardly possible to avoid the conclusion that the truth of the particulars therein contained is warranted, and Lord Watson says that " when the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk." The parties would not have made it the basis of the contract unless they had thought it material.

[The following cases were also referred to: *Wallis, Son & Wells* v. *Pratt & Haynes* (1); *Farr* v. *Motor Traders' Mutual Insurance Society* (2); *Hambrough* v. *Mutual Life Insurance Co. of New York* (3); *Union Insurance Society of Canton* v. *Wills & Co.* (4)]

Morrice Mackay K.C. replied.

The House took time for consideration.

1922. July 14. VISCOUNT HALDANE (read by VISCOUNT CAVE). My Lords, this is an appeal from a judgment of the Second Division of the Court of Session, which affirmed a decision of the Lord Ordinary who had tried the action, but varied the reasons on which that decision was based. The action was brought by the appellants to recover a sum of 500*l.* and interest against the respondents, with whom they had insured a motor lorry against fire and also any claims for damages made by the public. The vehicle had been in fact destroyed by fire. The question in the appeal is whether the respondents were freed from liability under the policy by reason of inaccuracy in a statement made by the appellants in the proposal submitted when the policy was issued, to the effect that the motor would usually be garaged at a certain address, whereas it was garaged elsewhere.

My Lords, the policy was issued to the appellants on February 8, 1917, by the agent in Glasgow of the respondents, who were Lloyd's underwriters. The transaction was initiated by a proposal form, signed on behalf of the appellants, who

(1) [1910] 2 K. B. 1003, 1012.
(2) [1920] 3 K. B. 669.
(3) (1895) 72 L. T. 140.
(4) [1916] 1 A. C. 281, 287.

were furniture removal contractors carrying on business at 46 Cadogan Street, Glasgow. They used motor cars and lorries in this business, which they had been in the habit of insuring. Among others with whom they had had transactions of this kind was a Mr. Hamilton, an insurance broker, who acted for various insurance societies. He appears to have called on them and to have offered a quotation for the insurance in question, which was accepted. He then filled in a form of proposal from information he thought he had obtained from them, and this when signed became the proposal form as to which the question had arisen. It commenced by setting out the particulars of the motor vehicle intended to be insured, the make being of what was called the Halley lorry type, and of the scope of the indemnity desired, confined to fire and to claims by the public. There then followed ten questions (to each of which a statement in answer was given), relating to the proposer's name and address, 46 Cadogan Street, Glasgow, and the purpose for which the vehicle was to be used. The fourth of these statements was made in response to a request for a statement of the full address at which the vehicle would usually be garaged. The answer given was "above address," that is to say, 46 Cadogan Street. There was a subsequent question as to the district in which the vehicle would be used, to which the answer was "Glasgow and district." The rest of the ten questions and answers are not material. Following on the proposal form and in the same document came the policy itself. It proceeded on the narrative that the insured (the appellants) had subscribed and delivered to the insurers the proposal form, dated January 22, 1917, "which proposal shall be the basis of the contract and be held as incorporated herein." The policy then stated that the premium had been paid for an insurance for twelve months, and it set forth the terms of the insurance as including (inter alia) indemnity to the extent of 500*l.* against loss or damage caused by fire. Appended to the policy and qualifying it there was a statement of "conditions of insurance." The fourth condition was in these terms: "Material misstatement or concealment

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Haldane.

of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

What happened was this. On December 27, 1917, the vehicle insured was garaged, not at 46 Cadogan Street, but at Dovehill Farm, which had been a farmsteading at Newlands, on the outskirts of Glasgow, but was within the city of Glasgow area. On that date it was burned accidentally. The vehicle was at the time of the fire within a building at Dovehill which had been a hay shed and was built of wood. In this shed, which was used by the appellants as a garage for their motor lorries, there were other vehicles. One of these, a petrol motor lorry, took fire, and in the conflagration the insured motor was burned up.

The question which arises is whether, under these circumstances, the respondents are liable under the policy they had issued. They contend that the fourth of the answers in the proposal form was untrue. They say that the vehicle insured was not intended to be usually garaged at 46 Cadogan Street but at Dovehill, and that the answer actually given to the fourth question was not accurate, inasmuch as it amounted either to a misrepresentation of intention as to present and future storing or to a contract as to storing in the future which was broken. They also argue that the fourth of the conditions appended to the policy was that any material misstatement or concealment of any circumstance material to assessing the premium was by express provision to render the policy void, and that there was actually misstatement or concealment of the circumstance that the vehicle was to be garaged at Dovehill, a garage which they allege was in such a situation and of such a character that if disclosure had been made the assessment of the premium would have been affected.

My Lords, the reply of the appellants, the insured, on this point was that the question whether the motor vehicle was to be stored at Dovehill or at Cadogan Street was not a material one. The chief risks covered by the policy were in the main wholly unconnected with fire at the garage, and

the percentage of the premium to be allocated to that risk was very small. The respondents called evidence to prove that they did consider that the question was one of importance, and the learned judges in the Court below appear to have given credence to that evidence and to have attached weight to it. This is an important fact, and I am reluctant to differ from them. But I think that, notwithstanding some differences in the way in which they cross-examined the witnesses called for the respondents, the appellants have sufficiently proved by testimony which commends itself that in all probability no importance would have been attached to any answer to the fourth question in the proposal form to the effect that Dovehill was to be the place of garage.

But that does not dispose of the case. For if the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the appellants being able to recover.

My Lords, for this reason it appears to me that the question which really lies at the root of the matter in dispute is one of construction simply. I do not look on the fourth condition appended to the policy as what is important for this purpose, for that condition extends to classes of possible misstatements and concealments which go beyond those to which the proposal statements are confined. On the other hand, they relate to any such as may be actually material in assessing the premium, as distinguished from such as are made by special stipulation as to accuracy conditions of the validity of the general contract of insurance. If there are statements in the answers to the questions in the proposal form which are in this way constituted by special stipulation conditions, they are therefore unaffected by the subsequent and independent condition dependent on materiality.

Now as to the character of such conditions, and as to what is implied in their constitution, there is a good deal of authority which is instructive. It is worth while to consider

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Haldane.

how the distinction between a condition and a representation came to be drawn in this connection. The distinction had its origin in the historical development of the law of England, but, as Lord Watson observed of the existing state of the law, the doctrine of warranty as applied to such stipulations in a contract of assurance is the same in the law of Scotland as in that of England: *Thomson* v. *Weems*. (1) "Warranty" is a somewhat unfortunate expression to have been used in this connection. The proper significance of the word in the law of England is an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract. Yet irrespective of this the word came to be employed in England when what was really meant was something of wider operation, a pure condition. If goods tendered in performance of a contract do not satisfy the conditions stipulated for, the buyer may reject them; but he may alternatively accept the goods and claim damages for breach of the stipulated condition, thus treating his claim as one for damages for a breach of warranty, sufficiently so constituted. The condition is thus wider than the warranty strictly so called, but may sometimes be founded on as giving rise to a contract of warranty.

In this way the restricted limits of the English common law encouraged the development of the notion of warranty in a fashion which would not have been required in Scotland, where law and equity were never severed. In England it was always possible to set aside a contract for misrepresentation, but the representation, although sufficient for the jurisdiction even though perfectly innocent, had to be material. Moreover, at common law it was no defence to an action on a contract that there had been misrepresentation, unless the misrepresentation were fraudulent or of a recklessness analogous to fraud: see the judgment of Jessel M.R. in *Redgrave* v. *Hurd*. (2) Possibly in order to provide for the difficulty occasioned by the limits of their jurisdiction, the Courts of common law showed great readiness to construe

(1) 9 App. Cas. 671, 687.

(2) (1881) 20 Ch. D. 1, 13.

a representation sufficiently expressed to be the foundation for the acceptance of a proposal made by a would-be insured to an insurer as a condition which, if accepted, had to be observed independently of any question of materiality. As Lord Blackburn observed in *Thomson* v. *Weems* (1): "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material." He goes on to point out that in policies of marine insurance it is settled that any statement of a fact bearing on the risk is, "by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least, that the compliance with that warranty is a condition precedent to the attaching of the risk." Without going so far as to hold that this rule is also applicable to the construction of life policies generally, he thought that it applied to the life policy before him, and "when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted."

My Lords, Lord Blackburn lays stress in these words on the expression "basis." In *Attorney-General* v. *Ray* (2) James and Mellish L.JJ., two great masters of accuracy in legal phraseology, employ the same term to denote what they considered descriptive of what was foundational or essential in the transaction before them. The case was not one in which the expression "basis" occurred in any policy, for it was concerned with a grant of an annuity for life, based

(1) 9 App. Cas. 683, 684. (2) (1874) L. R. 9 Ch. 397.

H. L. (Sc.) 1922 — DAWSONS, LD. v. BONNIN. — Viscount Haldane.

on a representation as to age, granted by the Commissioners for the Reduction of the National Debt. Mellish L.J., none the less, likened the transaction to one of an ordinary contract of life assurance where the representation is made the " basis," or an essential term of the contract, and materiality is consequently irrelevant. I do not think that it matters whether the representation which is made " basic " is as to a state of present fact or to something to be carried out in the future, such as garaging at a particular place. What is important in the latter alternative is that the insured cannot recover unless he can show that he has performed his part, for his performance has been made the condition of performance by the other party.

My Lords, with these principles of construction in view I turn to the contract before us. As to the fourth of the appended conditions, this, as I have already observed, extends to matters which go beyond in some respects, and are outside in other respects, those dealt with specifically in the proposal form. Moreover, the fourth condition is limited to what is " material to assessing the premium," and I will assume for present purposes that nothing material in this sense was misstated or concealed. If so, that fourth condition does not apply. But on the other hand I do not find in the language used in it anything which cuts down or interferes with the effect of the fourth of the answers in the proposal form, if this in itself imports a condition. If it does import by itself a condition, then I think that, as Lord Blackburn laid down in the passage quoted, it imports a condition which must be shown to have been complied with, whether material from an ordinary business standpoint or not. It is clear that the answer was textually inaccurate. I think that the words employed in the body of the policy can only be properly construed as having made its accuracy a condition. The result may be technical and harsh, but if the parties have so stipulated we have no alternative, sitting as a Court of justice, but to give effect to the words agreed on. Hard cases must not be allowed to make bad law. Now the proposal, in other words the answers to the questions

specifically put in it, are made basic to the contract. It may well be that a mere slip, in a Christian name, for instance, would not be held to vitiate the answer given if the answer were really in substance true and unambiguous. "Falsa demonstratio non nocet." But that is because the truth has been stated in effect within the intention shown by the language used. The misstatement as to the address at which the vehicle would usually be garaged can hardly be brought within this principle of interpretation in construing contracts. It was a specific insurance, based on a statement which is made foundational if the parties have chosen, however carelessly, to stipulate that it should be so. Both on principle and in the light of authorities such as those I have already cited, it appears to me that when answers, including that in question, are declared to be the basis of the contract this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability.

My Lords, for these reasons I feel myself compelled to assent to the general conclusion arrived at by all the learned judges in the Court of Session. But, for the reasons assigned, I prefer the ground taken by the Lord Ordinary and the Lord Justice-Clerk to that on which Lord Dundas and Lord Ormidale rest their reasoning. The former decided the case on the proposal form, the latter on the fourth of the appended conditions. I should accordingly desire, speaking for myself, to vary the language of the interlocutor of the Second Division by assoilzieing the respondents from the petitory conclusions of the summons, but only on the ground of the untrue answer given to the question in the proposal form. As to expenses I should be content to adopt the finding of the Inner House. It would follow that the respondents should have their costs of this appeal.

VISCOUNT FINLAY (read by LORD DUNEDIN). My Lords, this action was brought by the appellants, the owners of a motor lorry, to recover upon a policy of insurance issued by the respondents as underwriters. The lorry was completely

H. L. (Sc.) 1922

DAWSONS, LD. v. BONNIN.

Viscount Finlay.

destroyed by fire on December 27, 1917, in the garage at Dovehill, Newlands, Glasgow.

The respondents raised several defences to the claim. The first was a charge of fraud in the claim. As to this, the Lord Ordinary said that the defenders' allegations of a fraudulent claim were not only not proved but had been disproved. The respondents further pleaded that there were misstatements on material matters which vitiated the policy under the fourth of the conditions indorsed thereon. The Lord Ordinary found that this defence had no foundation in fact, and nothing has been said about it on the present appeal.

There remains for consideration only the defence raised in the second answer and in the first and fourth pleas in law for the defenders. The second answer contained the following averment: "In the proposal which is the basis of the policy, the following question and answer occur 'State full address at which the vehicles will usually be garaged.' (A.) 'Above address' (which was 46 Cadogan Street, Glasgow). The said answer is untrue and misleading. The information requested and given was of material importance to the defenders in considering the said proposal, and they contracted on the faith that the answer was true. In consequence of its falsehood, the policy is void."

The first plea in law for the defenders was this: "1. The policy is void because of the untrue answer given to the question in the proposal referred to in Answer 2 hereof, and because the information contained in said answer was material to the formation of the contract, and misled the defenders on a material matter."

The fourth plea in law was the following: "4. The proposal of the pursuers being false and misleading with reference to the place where the motor car insured would be garaged, the defenders are entitled to absolvitor."

The appellants are contractors who used motor vehicles in the course of their business, one of them being the motor lorry in respect of which this action is brought. They had an office and warehouse, used for storing furniture, at 46 Cadogan Street, Glasgow. The respondents are a group of underwriters

at Lloyd's, who issue what are known as the "Premier" policy. One of their agents was Mr. Thomas Miller Hamilton, who is an insurance broker carrying on business in Glasgow. He called on the appellants at their office, 46 Cadogan Street, with a view to getting the appellants to insure with his clients, the respondents. Mr. Hamilton then and there filled up the proposal form, as he said, on information given by Mr. Maxwell, the appellants' secretary. Mr. Maxwell initialled the proposal as filled up by Mr. Hamilton. It contained the following: "1. Proposer's Name—*Dawsons, Ltd.* 2. Proposer's Address—46 *Cadogan St., Glasgow* . . . . . 4. State full address at which the Vehicles will usually be garaged—*Above address.* . . . . 9. In what district will the vehicles be used ?—*Glasgow and district.*"

The lorry in question was, in fact, never garaged at 46 Cadogan Street. Mr. Hamilton says that he must have got the information as to the place of garage from Mr. Maxwell, the appellants' secretary. Mr. Maxwell denies this, and taking the evidence of both Mr. Hamilton and Mr. Maxwell together it is, I think, clear that the answer to the effect that the vehicle would usually be garaged at 46 Cadogan Street was the result of a blunder on the part of Mr. Hamilton himself and was not based on information from the respondents. Mr. Maxwell, however, failed to detect the blunder so made by Mr. Hamilton, and signed the application which had been filled up by him. The fact remains that Mr. Maxwell made the proposal in this form and that his company accepted the policy which incorporated the proposal and insurance. The defenders contend that the mistake in the answer as to the garage forms a good defence to the action, and its validity must, of course, be decided on legal principles. No defence has been pleaded raising any question how far the respondents can take advantage of a mistake in the answer for which their agent was primarily responsible, and the question whether this mistake in the proposal vitiated the policy must be decided simply on grounds of law and on the pleadings.

The proposal form contained a description of the vehicle to be insured and the answers to which I have already referred.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Finlay.

The policy itself recites the proposal and says that it is to " be the basis of the contract and be held as incorporated herein." The underwriters bound themselves to indemnify the assured subject to the conditons on the back as against certain perils, including loss by fire. The fourth of the conditions on the back is this : " 4. Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

It was urged on behalf of the respondents that the statement of the usual place of garage was a warranty in the sense in which that term is used with reference to contracts of insurance, and that if it was not correct the action must fail, whether the statement was material or not in itself. The Lord Ordinary held that this statement was such a warranty, and, in his interlocutor of July 15, 1920, found that the policy " is void because of the untrue answer given to the question in the proposal." On appeal the Second Division also decided in favour of the underwriters, the respondents in the present appeal, but on grounds entirely different from that on which the Lord Ordinary had proceeded. They held that the fourth condition indorsed on the policy applied, and that the policy was void, because the answer in the proposal form contained a material misstatement by the assured of circumstances material to assessing the premium on the policy.

I agree with the Second Division that the case is governed by the fourth of the indorsed conditions. I am unable to agree with them in the view that the statement as to the garage was material to assessing the premium on the policy, and if I am right in this view it will follow that the appeal should be allowed and judgment entered for the appellants.

I am wholly unable to adopt the view on which the Lord Ordinary proceeded that the clause amounted to a warranty.

The expression " warranty " imports that a particular state of facts in the present or in the future is a term of the contract, and, further, that if the warranty is not made good the contract of insurance is void. It is not necessary that the term " warranty " should be used, as any form of words

expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality of the facts in themselves is irrelevant; by contract their existence is made a condition of the contract. But if the language used is not clear the materiality or immateriality of the facts said to be warranted may be an element in arriving at a conclusion on the question whether the language used should be construed as constituting a warranty.

In the present case it appears to me that the evidence establishes that the statement as to the garage was not material to the present insurance. In the case of an ordinary policy covering a motor against fire risk the question of the garage might be very material. Its structure and locality might affect the chances of fire or the chance of fire being extinguished if it should break out, but as to the present policy, the evidence of the pursuers' witnesses, Olden, Stewart and Ballantyne, is quite distinct that the risk of fire in the garage is so insignificant in comparison with the other risks insured, which are those of the road, including fire on the road, which might result from self-ignition, that it is ignored in fixing the premium. It is true that the evidence of the defenders, upon whom lay the onus probandi, had been taken before the evidence for the pursuers, and it is said, and I think with justice, that the cross-examination of the defenders' witnesses on this point was insufficient. The defenders, however, did not object on this ground to the reception of the pursuers' evidence on the point, and, further, the defenders, if they had been in a position to controvert the pursuers' evidence, might have applied to be allowed to adduce evidence on the point which had been so clearly developed in the evidence of the pursuers' witnesses. They made no such application, and for this there can be only one reason—namely, that they were not in a position to controvert the truth of the evidence given by the pursuers' experts. We must therefore take the evidence as it stands, with the result that there is no contradiction of the pursuers' evidence on this point.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Finlay.

If the risk of fire in the garage did not affect the premium it could not be material. It would require clear language in the policy to establish that a statement of an immaterial point of this nature had been made a condition of the policy by warranty. The very usual clause making the truth of the answers in the proposal a condition of the policy, so that it is void if they are in any respect untrue, does not occur in the present policy, and the fact that such a clause is usual cannot be ignored in determining whether a policy in which it is absent amounts to a warranty.

The respondents are therefore driven to rely solely upon the clause in the policy that the proposal should be the basis of the contract and be held as incorporated therein. This clause appears to me to be inadequate to support the conclusion which the respondents desire to draw from it. The proposal is no doubt the basis of the contract of insurance in the sense that it initiated the transaction and that in response to it the insurance was granted. But this does not in the least involve the proposition that any inaccuracy on any point in any of the answers, however immaterial, would be fatal to the policy. If the statement were material to the risk it might be another matter altogether. The policy is put forward by the underwriters and it must be construed contra proferentes. If its effect is ambiguous it must be read in favour of the assured.

The existence of the fourth condition indorsed on the policy tends strongly to show that the answer as to the garage should not be read as a warranty. The fourth condition is one subject to which the contract of insurance came into existence, and it is an integral part of the contract. On the fair reading of the contract as a whole, including the fourth condition, the inference seems to me irresistible that it was only material misstatements, whether in the proposal or elsewhere, that were to render the policy void.

A great many authorities were cited in the argument. The most important of them is *Thomson* v. *Weems*. (1) In that case the "declaration" was stated to be the basis of

(1) 9 App. Cas. 671, 687.

the assurance, and it was provided that if anything averred in the declaration should be untrue, the policy should be void and all moneys received by the insurance company in respect thereof should belong to the company. The policy was on life, and in the answers to the questions in the proposal it was stated that the habits of the assured were temperate and had always been so. These answers were false in fact. It was held in the House of Lords that the truth of particulars in the declaration was warranted and that their untruth, apart from any question of fraud and recklessness, vitiated the policy. Lord Watson said: "The question" (as to temperance) "must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed contra proferentes, and in favour of the assured."

In the present case there are no such words as those which formed the ground of decision in the *Weems Case*, and I think that the attempt to spell out their equivalent from the terms used in the present policy has not succeeded. The case really falls to be determined on the fourth of the indorsed conditions, and as the misstatement was not material to the question of premium, the appeal, in my opinion, should be allowed.

VISCOUNT CAVE. My Lords, it is common ground that the proposal for the policy of insurance issued by the respondents to the appellants contained a misstatement as to the place where the lorry to be insured would usually be garaged; and the only question is whether this misstatement avoids the policy.

The policy commences with a recital of the proposal (a full copy of which is annexed to the policy), and proceeds "which proposal shall be the basis of this contract and be held as incorporated therein." It was faintly contended on behalf of the appellants that this provision did not bind them, as it was not contained in the proposal which they signed,

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Cave.

but only in the policy which was not signed by them; but this contention appears to me to be wholly untenable. The appellants accepted the policy and sued upon it; and they cannot, while relying upon the policy, repudiate one of its provisions. I therefore put aside this contention and treat the words quoted as a term of the contract.

What, then, does the sentence quoted mean? I cannot think that it amounts to nothing more than a statement that the proposal initiated the transaction and led to the grant of the policy. That fact sufficiently appears from the recital of the proposal; and the addition of an express stipulation that the proposal shall be treated as incorporated in the policy and shall be the basis of the contract, is plainly intended to have some further effect. "Basis" is defined in the Imperial Dictionary as "the foundation of a thing; that on which a thing stands or lies"; and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson* v. *Fitzgerald* (1) and *Thomson* v. *Weems* (2), in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that in *Anderson* v. *Fitzgerald* (3) Lord Cranworth referred to the above-mentioned provision, as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in

(1) 4 H. L. C. 484. (2) 9 App. Cas. 671.
(3) 4 H. L. C. 500.

Thomson v. *Weems* (1) Lord Blackburn said: "But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . . is warranted." Lord Esher, in *Hambrough* v. *Mutual Life Insurance Co. of New York* (2), uses the word "basis" in the same sense.

Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the "basis" clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered.

But it is contended on behalf of the appellants that the "basis" clause is limited or qualified by the fourth condition on the back of the policy, which is in the following terms: "Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

And it is argued that, having regard to this condition, a misstatement in the proposal does not avoid the policy unless it is a material misstatement. I do not take that view. The "basis" clause and the fourth condition do not cover the same ground. The former includes promissory statements which are apparently not within the condition; and the condition covers misstatements and concealments outside the proposal with which the "basis" clause is not concerned. I think the two clauses are independent and cumulative provisions, each of which must take effect. But even if it be otherwise, and if the effect of the condition is that the policy is only to be made void by misstatements which are material, the result is, I think, the same; for it seems to me impossible for a Court to say that statements which the parties themselves have described in the policy as incorporated in and forming the basis of the contract are wholly immaterial

(1) 9 App. Cas. 684. (2) 72 L. T. 140.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Viscount Cave.

to the contract. As Lord Sumner said in *Yorkshire Insurance Co., Ld.* v. *Campbell* (1), "since the parties have imported this statement into their contract presumably they thought it material"; and this is certainly not less true when they have agreed that the statement shall be the basis of the contract. In these circumstances it appears to me to be irrelevant to consider the conflicting evidence in the case as to whether a misstatement as to the place of garage is, in the ordinary sense, material or not. The parties have agreed that it shall be deemed material, and that concludes the matter.

I must confess that I have little sympathy with the respondents, who seek to profit by a mistake to which their agent contributed; but the case must be decided according to law, and I think that the law is on their side. I would therefore vary the interlocutor of the Second Division in the manner proposed by the noble and learned Viscount on the Woolsack, the appellants to pay the costs of this appeal.

LORD DUNEDIN. My Lords, I have found this case one of difficulty. Had I been able to take the view that was taken of the evidence by the learned judges of the Court of Session it would have been easy. That view is embodied in the finding: "Find that the policy is void because the answer to the fourth question in the proposal form contains a material misstatement of a circumstance by the insured material to the assessing of the premium under the policy."

I think that the evidence shows that the misstatement was not in fact material to the assessment of the premium. I cannot therefore decide the case upon the ground of the application of the fourth section of the conditions of assurance, which provides that "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." The same view of the evidence disposes of what I may call the common law doctrine in insurance cases as to disclosure of facts material to the risk.

(1) [1917] A. C. 218, 225.

Nor am I able to say that the series of cases, of which *Weems* (1) may be taken as a type, enable me to find direct authority. In each of these cases—they are cited by the Lord Ordinary in his opinion—there was either a statement signed by the proposer that his answers to the questions put to him were true, and that he warranted them to be true; or there was a clause in the policy that if any of the statements were untrue the policy was to be void.

Was then the statement as to the usual place of garage material? I pointed out in the case of *Wade* v. *Waldon* (2) that there may be in contracts certain stipulations which go to the root of the contract, a breach of which entitles the other party to hold the contract at an end; and that there are other stipulations which do not go to the root and only give rise, if broken, to actions of damages. At the same time I quoted Lord Watson, who in his turn quoted the judgment of Blackburn J. in *Bettini* v. *Gye* (3), and pointed out that it was within the power of parties to contract that particular matters, however trivial, might form conditions precedent. Have the parties so contracted in this case? That raises the pure question, as yet I think undecided, when certain statements are said to be the "basis of the contract and incorporated therewith," is that equivalent to saying that these statements are held to be contractually material?

After much consideration, unwillingly in the circumstances of the case, and contrary to my first impression, I have come to the conclusion that it is. I think that "basis" cannot be taken as merely pleonastic and exegetical of the following words, "and incorporated therewith." It must mean that the parties held that these statements are fundamental—i.e., go to the root of the contract—and that consequently if the statements are untrue the contract is not binding. And therefore I come to the same conclusion as has been come to by the noble Viscount who has preceded me and for essentially the same reasons.

(1) 9 App. Cas. 671. (2) 1909 S. C. 571, 576.
(3) (1876) 1 Q. B. D. 183.

H. L. (Sc.) 1922 DAWSONS, LD. v. BONNIN. Lord Dunedin.

I ought, in justice to the learned judges of the Court of Session, to say that I find that they had proposed to follow what Lord Sumner said in the *Yorkshire Insurance Co. Case* (1), but by the finding quoted they put the judgment on the other ground. I am of the opinion that the appeal must be dismissed with the variation proposed.

LORD WRENBURY. My Lords, I make two preliminary observations upon the fourth question in the proposal. First, the appellants have argued that the purpose of that question —"State full address at which the vehicles will usually be garaged"—is to fix the area for rating purposes—i.e., for the purpose of determining the rate under which the risk will fall, that the relevance of the answer lies in the word "Glasgow," and that no discrimination is to be made as between Dovehill Farm and Cadogan Street. That argument overlooks the ninth question: "In what district will the vehicles be used?" The answer to that question will determine the area. The purpose of the fourth question must be some purpose other than that. Secondly, the fourth question is directed solely to the situation and not to the construction of the garage. The second question asked for the proposer's address. The fourth asked for what may be called the car's address. It made no inquiry whether the building of the garage would be of stone, brick, iron, wood or any other material. There is no question anywhere in the proposal form as to construction. At most, it asked information which would enable the intending insurers to visit the building and see what its construction was.

With this premiss I turn to consider the contract. It may be described as consisting of three parts. The first part consists of the proposal. This is a document signed by the intending assured, but not by the intending insurers. It contains no words such as there were in *Thomson* v. *Weems* (2) and in *Yorkshire Insurance Co.* v. *Campbell* (1) expressive that the intending assured declares or vouches or

(1) [1917] A. C. 218. (2) 9 App. Cas. 671.

warrants that the statements contained in it are true. It is a document whereby the proposer makes certain statements of fact, and if those statements are inaccurate or misleading the proper consequences will follow which result from misstatement made in inducing a contract. In order to see what these are in this case it is necessary to look further. The second part consists of the operative body of the policy, consisting of recital and operative words of obligation. By way of recital this document states that the proposer has made a proposal which is to be "held as incorporated herein." As this proposal was a unilateral document signed by the proposer only, it can be incorporated only by way of recital. When I have incorporated it I find only that the policy says that the proposer had made certain statements, and so he had. As further part of the recital under review, the document runs "which proposal shall be the basis of this contract." The whole effect of these words I think is to state that the proposal is to be taken to be the initiation and foundation of the contractual relation, and the statements contained in the proposal are to be statements on the faith of which the insurers are prepared to contract. The statements in the proposal are thus made material. I must look at the contract to see what effect is to be given to their materiality. To see what is to ensue if any of them are inaccurate I have therefore still to look further.

If a contract is induced by misrepresentation, the misrepresentation does not necessarily render the contract void. It may render the contract voidable at the instance of the contracting party who proves that he was misled. This differs toto cælo from a case in which the contract itself provides that if a certain alleged fact is not true the contract shall be void. In that case the contract becomes contractually void, because the contract itself provides that in that event it shall be void. In the former case the contract remains an operative obligation, but one from which the party misled may be in a position to relieve himself, because he cannot be held to a contract which was tainted at its source.

H. L. (Sc.)
1922
DAWSONS, LD. v. BONNIN.
Lord Wrenbury.

The question here is what was, in this case, the position of the insurers in this respect? This brings me to the third part of the contract—namely, the "conditions of insurance." By the operative words of the policy the obligation of the insurers is "subject to the conditions on the back hereof, the due observance of which is a condition precedent to all liability of the underwriters hereunder." The fourth condition is "Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." As matter of construction I hold that this means "Material misstatement, by which I mean misstatement material to assessing the premium." Further, I think that the sentence is a pregnant sentence, and by providing that certain statements shall render the policy void it intends that those and only those misstatements shall render the policy void, thus excluding a construction which would give to other statements the effect of a warranty. Misstatements not material to assessing the premiums are not to render the policy contractually void, but their effect is to be determined by the considerations relevant to misstatement as distinguished from warranty.

This being my view of the contract I turn to the evidence. I am satisfied by the evidence of Olden, Stewart and Ballantyne that the question whether the car is to be garaged in a building of brick, stone or wood makes no difference in assessing the premium. The risk of fire (including both risk on the road and risk in the garage) carries a very small proportion, say 5 per cent., of the premium. And fire risk on the road is so much greater than fire risk in the garage that the latter is negligible, and in point of fact the construction of the garage is not taken into account at all in assessing the premium. Assuming that there was a misstatement as to construction of the garage, this was not within condition 4 a misstatement material to assessing the premium. Further, there was no misstatement at all as to the construction of the garage. There was no statement about it. None was asked for. Neither under the condition nor under the general law

as to misstatement therefore can the insurers avoid the contract.

I have the more satisfaction in arriving at this conclusion, because I can have no doubt that the insurers attributed no importance at all to this question of construction: that at most they asked for and obtained information as to locality of which they might have availed themselves if they attributed importance to construction, but that they never did so. And, further, looking at Hamilton's evidence and Maxwell's evidence, it is plain that it was not Maxwell, the secretary of the assured, who introduced into the proposal the words "above address." Indeed, Maxwell did not know they were there, and would not have signed if he had known. It was Hamilton, the broker of the insurers, who was seeking to obtain the contract, who wrote the words "above address," and by the words "supposing he did" (i.e., supposing Maxwell said something to the effect "We garage our own cars"), it is plain, I think, that Hamilton was not prepared to say, and could not truthfully say, that Maxwell made the representation upon which all the edifice of an alleged statement that the car would be garaged in a stone or brick building and not in a wooden building is founded.

My Lords, in my opinion the resistance of the insuring office (who have taken the premium) to satisfy the claim of the assured upon his policy is neither creditable nor capable of being sustained. I think the assured is entitled to succeed on this appeal.

Interlocutor of the Second Division of the Court of Session in Scotland varied by omitting therefrom the words "Recal the 2nd finding in said interlocutor, in lieu of which find that the policy is void because the answer to the 4th question in the proposal form contains a material misstatement of a circumstance by the insured material to assessing the premium in the policy" and also the word "also," and, subject to such variation, affirmed.

H. L. (Sc.)
1922
DAWSONS, LD. v. BONNIN.

Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The appellants to pay the costs of the appeal to this House.

Lords' Journals, July 14, 1922.

Agents for the appellants: *Simmons & Simmons, for Manson & Turner Macfarlane, W.S., Edinburgh.*

Agents for the respondents: *Carpenters, for A. P. Hamilton & Callander, Writers, Glasgow, and Allan-Lowson & Hood, Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1922 *July* 28.

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS AND OTHERS . . . . . } APPELLANTS;

AND

BRAITHWAITE AND OTHERS . . . . RESPONDENTS.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS AND OTHERS . . . . . } APPELLANTS;

AND

ASHLEY AND ANOTHER . . . . . RESPONDENTS.

Trade Union—Expulsion of Member—Action for Injunction—Participation in Employers' Profit-sharing Scheme—Rules of Union—Illegal Association—Directly enforcing Agreement between Members as to Employment—Jurisdiction of Court—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

Sect. 4 of the Trade Union Act, 1871, provides that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing: (1.) any agreement between members of a trade union as such concerning the conditions on which any members shall or shall not be employed; and (3.) any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members.

The plaintiffs in the two cases were respectively members of two

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

different registered trade unions. In the first case the rules of the trade union provided that it should be competent for the branch committee or other authorities there mentioned to fine or expel any member "working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares." In the second case the rules contained a similar power to fine or expel any member proved to be "working against the interests of the society by working on the premium bonus system."

The trade unions threatened to expel the plaintiffs on the ground that they were participants in a profit-sharing scheme, instituted by the company by whom they were employed, under which meritorious employees might become entitled to a share of the profits and might invest the same in the purchase of shares in the company. This was independent of their wages, which were paid by the company at full trade union rates. In actions by the plaintiffs for injunctions to restrain the threatened expulsion:—

Held, (1.) that the jurisdiction of the Court to entertain the actions was not ousted by s. 4 of the Act; and (2), on the construction of the rules, that the plaintiffs were not liable to be expelled on the ground of their participation in the profit-sharing scheme.

Rigby v. *Connol* (1880) 14 Ch. D. 482 considered.

Decision of the Court of Appeal [1921] 2 Ch. 399 affirmed.

APPEALS from a decision of the Court of Appeal (1) reversing a decision of Eve J. in two actions, which were tried together.

The facts are fully stated in the report of the proceedings before the Court of Appeal, but the following summary may be useful.

In the first appeal the respondents were members of the Amalgamated Society of Carpenters, Cabinet Makers and Joiners (the appellant society), which was a registered trade union. They were employed by Lever Brothers, Ld., as carpenters or joiners on trade union terms and at trade union wages and they were participants in a scheme known as Lever Brothers' co-partnership scheme, under which meritorious employees of the company of a certain standing were, at the discretion of the trustees of the scheme (who were directors of the company), allotted "partnership certificates" entitling them during the currency of the certificates to receive a share in the profits of the company in addition to their wages, and these profits it was the practice of the employees to invest in the shares of the company.

(1) [1921] 2 Ch. 399.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

On November 8, 1919, the United Trades Committee of the Liverpool and Birkenhead Districts of the National Associations of Carpenters and Joiners, which was a joint committee composed of delegates from branches within the district of the appellant society and the General Union of Operative Carpenters and Joiners (the appellant society in the second appeal) issued to the representative officers of the different branches of the appellant society within the district (including the branch to which the respondents belonged) a notice or instruction to the effect that any members who were participating in Lever Brothers' co-partnership scheme on and after November 14 must be excluded from the society in accordance with the general rules.

The respondents, having thus become liable to expulsion, brought an action against the appellants, the society and its officials, for an injunction restraining the appellants from excluding the respondents from the appellant society on the ground of their participation in the said scheme.

The appellants contended: 1. That the action was a proceeding instituted with the object of directly enforcing an agreement between members of a trade union as such concerning the conditions upon which members should be employed, within s. 4 of the Trade Union Act, 1871, and that consequently the Court had no jurisdiction to entertain the action; 2. that the respondents by continuing to participate in the scheme were liable to expulsion under Rule 32, sub-s. 1, of the rules of the appellant society.

Rule 32, sub-s. 1, provided that it should be competent for any managing committee, district council, branch committee, or branch at a special quarterly meeting "to fine (not exceeding 5*l.*) or expel any member from the Society upon satisfactory proof that such member has refused to comply with their decision, or by his conduct brought the Society into discredit, wilfully violated the recognized trade rules of the district in which he is working, or working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern."

In the second appeal the respondents were members of

the General Union of Operative Carpenters and Joiners, the appellant society. This case differed in no way from the previous appeal except that the appellant society relied upon Rule 31 of their rules. That rule provided that any member proved to the satisfaction of the Executive Committee, District Committee, or lodge "to be working against the interests of the society by working on the premium bonus system" might be fined or expelled as the Executive Committee, District Committee, or lodge might determine.

Eve J. dismissed both actions on the ground of want of jurisdiction.

The Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.), on the contrary, held that the jurisdiction of the Court was not excluded by s. 4 of the Trade Union Act, 1871, and gave judgment for the respondents in each action.

1922. June 30; July 3. *C. E. E. Jenkins K.C.* and *Brocklehurst* for the appellants in both cases. The question of jurisdiction is common to both appeals. In each case the union is admittedly an illegal association at common law and its agreements are subject to the provisions of the Trade Union Act, 1871. Having regard to s. 4 of that Act, in neither case has the Court any jurisdiction to entertain the respondents' action, because it was brought with the object of directly enforcing two agreements which the section says are unenforceable: 1. An agreement for the application of the funds of a trade union to provide benefits to members; and 2. an agreement between members of a trade union as such concerning the conditions on which the members shall be employed. As to 1: this point was not open to the appellants in the Courts below by reason of the second *Osborne Case—Osborne* v. *Amalgamated Society of Railway Servants* (1)—but that case is not binding on your Lordships. An action by a member of a society to restrain his expulsion is founded on the member's right of property in the assets

(1) [1911] 1 Ch. 540.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

of the society. That is the only ground on which the action can be maintained, and the effect of getting an injunction is to put him in possession of the right to enjoy the benefits provided by the society to its members. By applying for an injunction to restrain the trade union from expelling them the respondents are directly enforcing an agreement for the application of the funds of the union for the benefit of the members. An injunction to restrain a breach of an agreement is a direct enforcing of the agreement: *Rigby* v. *Connol* (1); *Aitken* v. *Associated Carpenters and Joiners of Scotland* (2); *Chamberlain's Wharf* v. *Smith* (3); *Smith* v. *Scottish Typographical Association* (4); *McLuskey* v. *Cole.* (5) In *Yorkshire Miners' Association* v. *Howden* (6), as in *Wolfe* v. *Matthews* (7), the plaintiff was seeking to protect the funds for the general benefit of the union as prescribed by the rules, whereas this is a case of an individual plaintiff seeking to enforce the rules for his personal benefit. It has therefore no direct bearing on the present case. Notwithstanding some criticism in that case of the language of Jessel M.R. in *Rigby* v. *Connol* (1) the decision of the Master of the Rolls, rightly understood, has never been overruled and is right, and, in fact, it was recognized as good law both by Lord Macnaghten and by Lord Lindley in *Howden's Case.* (6) As to 2: the members have agreed to come into the union on the terms that if they work, in the first case, on a co-partnership system, or, in the second case, on a premium bonus system, they shall be liable to fine or expulsion. That is an agreement between the members as such concerning the conditions on which they shall be employed. But then it is said that this is not an action to enforce that agreement. In the appellants' submission the respondents are seeking to enforce the rules—in the one case Rule 32, sub-s. 1, and in the other case Rule 31—according to their reading of them—they are seeking to enforce an

(1) 14 Ch. D. 482, 487.
(2) (1885) 12 R. 1206.
(3) [1900] 2 Ch. 605, 612.
(4) 1919 S. C. 43, 55.
(5) [1922] 1 Ch. 7, 10.
(6) [1905] A. C. 256.
(7) (1882) 21 Ch. D. 194.

agreement that they are entitled to work under this partnership scheme and yet remain members. *Chamberlain's Wharf* v. *Smith* (1), which has never been questioned, is an authority in the appellants' favour on this point also. The Court has therefore no jurisdiction to entertain these actions.

[They also referred to *Kelly* v. *National Society of Operative Printers*. (2)]

As to the merits, the respondents by their participation in this co-partnership scheme are working on a co-partnership system and also on the premium bonus system contrary to the rules of their respective unions.

Clauson K.C. (with him *Cunliffe K.C.* and *Cecil Turner*) for the respondents in both cases (called on only on the construction of the rules). These workmen are not working on a co-partnership system within Rule 32, sub-s. 1. It is admitted that they are employed on trade union terms and at trade union wages. All that is complained of is that persons interested in the company systematically give to their employees gratuities the amount of which depends on the success of the concern. An employee has after a time a reasonable anticipation that he will receive the gratuity, but he has no right to it. This is wholly apart from the terms of his employment. It is no part of this particular scheme that the workman should hold any shares in the concern at all, and the fact that he may invest the money he receives in shares does not affect the question. This therefore cannot be fairly described as working on a co-partnership system. The system which regulates the relations of employer and employee is wholly unaffected. The system referred to in Rule 32, sub-s. 1, involves that a workman, qua workman, should necessarily have a share in the concern in which he is employed. The rule was directed to arrangements of a quasi-partnership character in which the employer was put in control. Assuming that this is a co-partnership system, it is not hit by the rule, for it imposes no restrictions on the operatives. Still less can this scheme be regarded as a premium bonus system within Rule 31. That system

(1) [1900] 2 Ch. 605. (2) (1915) 113 L. T. 1055.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

means that a reward is given for efficient and speedy work. Here the gratuity is not apportioned in accordance with the work done.

C. E. E. Jenkins K.C. replied.

The House took time for consideration.

1922. July 28. LORD BUCKMASTER (read by LORD SUMNER). My Lords, in this case the Court of Appeal have granted an injunction restraining the appellants, who are a registered trade union, and its officials, from expelling the respondents from the union on the ground of participation in the co-partnership scheme of Lever Brothers, Ld. These are not the actual words of the injunction, but they contain its substance, and the question upon this appeal is whether such an order can be supported or no. The appellants contend that it cannot upon the ground (1.) that the action out of which this appeal has arisen was one that the respondents were unable to bring, and (2.) because Rule 32 of their society justifies the expulsion.

The history of the matter has been very fully stated in the judgments of the Court of Appeal, to which reference may be made for the purpose of enlarging the essential details to which I will refer. The respondents are two workmen each of whom has been in the service of Lever Brothers, Ld., for upwards of twenty-eight years. They are members of the appellant union, and they are employed at trade union rate of wages on trade union conditions of work. By a trust deed dated May 1, 1909 (amended by sundry supplementary deeds), made between William Hesketh Lever, of the first part, Lever Brothers, Ld., of the second part, and certain directors, called the trustees, of the third part, an arrangement was made to which none of the operatives were parties, by which it was provided that certain certificates of 1*l.* each or in multiples of 1*l.* called "partnership certificates" should be issued to such persons in the employment of the company as might be determined by the trustees upon application made in writing. The application form

required the applicant to agree that, among other things, he would "loyally and faithfully further the interests of Lever Brothers, Ld., its associate companies, and my co-partners," and the conditions of the certificate provided that the certificate should be cancelled for breach of this obligation. The certificates carried with them certain rights of dividend, and these the employee was at liberty either to take in cash or to invest in shares of the company. The extent to which the interest of the employee became by this means involved in the fortunes of the business may be seen by looking at the table showing the advantages that one of the respondents, Frederick Braithwaite, received under this scheme. From 1909–1920 he had allotted to him partnership certificates to the extent of 255*l.*; the dividends that he received in respect thereof he, to a considerable extent, invested in shares of the company, so that in 1920 he held 854 shares of 5*s.* each; and in 1919 the amount allotted to him for dividends in respect of partnership certificates and the shares amounted respectively to 47*l.* 8*s.* and 25*l.* 12*s.* In other words, he received 73*l.* in addition to his trade union rate of wages.

Now Rule 32 of the society provides that it shall be competent for a managing committee, a district council, or a branch committee at a special or central meeting to fine to an extent not exceeding 5*l.* or to expel any member from the society upon satisfactory proof being given that such member is "working on a co-partnership system when such system makes provision for the operatives holding only a minority of shares in the concern." I have omitted reference to the loose ungrammatical construction of the sentence; the words as quoted give, I think, its fair interpretation. Acting under this rule, the secretary of the joint committee of the appellant unions gave instructions that any member in the employment of Lever Brothers, Ld., who was participating in the co-partnership scheme must be excluded from the societies in accordance with the general rules. The respondents became liable to such notice and accordingly issued a writ against the union claiming an injunction to restrain such expulsion.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Buckmaster.

The first question that arises is whether such action can be maintained. It is alleged that it cannot, upon the ground that it is expressly prohibited by s. 4 of the Trades Union Act of 1871. The relevant part of that section is in the following terms: "4. Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely: 1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: . . . 3. Any agreement for the application of the funds of a trade union,—(*a*) To provide benefits for members. . . . . But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful." It is said that this proceeding offends that section for two reasons: the first, that it is instituted with the object of directly enforcing an agreement between members of a trades union concerning the conditions on which they shall or shall not be employed; and secondly, because it directly enforces an agreement for the application of the funds of trades unions to provide benefits to members. I am of opinion that it does neither one thing nor the other. Looking at the words of the section alone, unaided and unembarrassed by previous decisions, I should have thought it plain that an action which in fact asks for nothing but a declaration as to the construction of a rule as to membership and as incident thereto, an injunction, was not an attempt to enforce directly any such agreement as that referred to in the statute. It is, of course, true that no such claim could lie unless there were some right of property possessed by the member by virtue of his membership. And one of the most obvious instances of such right is his right to share in the benefits provided for members. But in this action there is no direct attempt to interfere with the application of the funds at all. It is nothing but a declaration as to membership with an injunction in its support. It appears to me that it is a totally different

proposition to say that a man claims to possess rights and that he seeks to enforce the obligations they create. The latter may be prevented by the statute; the former is not. Nor is he seeking to enforce an agreement with regard to the terms upon which workmen are to be employed. He says that the conditions imposed do not apply to the conditions of his labour, which is the exact opposite of any attempt to enforce such conditions. Had the matter been free from authority, these circumstances would, in my opinion, have disposed of the appeal, but authorities on the section are numerous and, unfortunately, difficult to reconcile.

One of the earliest is *Rigby* v. *Connol* (1), a decision the authority of which can only be maintained as against subsequent cases by regarding the actual words of the claim as those which support the decision. For in that case, a claim brought by a workman to prevent expulsion based on a breach of a rule with regard to the apprenticeship of his son asked that the plaintiff might be declared entitled to participate in the enjoyment of the property of the union and an injunction restraining the union from excluding him from such participation, a claim that appears to have been framed in direct opposition to the words of the statute; and it was on these words that Sir George Jessel based his judgment, for he said: "If I decide in favour of the plaintiff I . . . . declare him entitled to participate in the property of the union . . . . and I restrain the society from preventing that participation." It is, however, impossible not to see that the learned judge might, if he had thought fit, have moulded the injunction so that it merely followed a declaration as to membership, and I cannot resist the impression that he thought such a claim was also barred. It may be out of respect to the great authority of Sir George Jessel that this decision has never been definitely overruled. Technically, it is true that the judgment may be supported, but in substance it cannot. In *Yorkshire Miners' Association* v. *Howden* (2), in a judgment which binds this House, it was decided that an application to prevent by injunction

(1) 14 Ch. D. 482, 490-1.
(2) [1905] A. C. 256, 265.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Buckmaster.

the application of the funds of a trade union for a purpose for which they were not authorized was an action which it was competent for any member of the union to maintain, and I find it impossible by any refinement of language or argument to accede to the present appellants' contention without disregarding the opinion of Lord Macnaghten, in which he states his reasons for maintaining the action in these words: "Then I come to the question, What was the 'object' of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined, but the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members"; and to make the matter more plain, the learned Lord adds that he is aware that in expressing this view he is dissenting from the opinion of Sir George Jessel in *Rigby* v. *Connol* (1) contained in the words on which reliance must be placed if *Rigby* v. *Connol* (1) be regarded as establishing a general proposition. This opinion was dissented from by Lord Davey and by Lord James of Hereford, but, notwithstanding the penetrating criticism of Lord Davey, it is one which must be accepted and in substance governs the present case. Again, in *Osborne* v. *Amalgamated Society of Railway Servants* (2), a decision was reached which actually covers the present dispute, except so far as it relates to the conditions of labour; for there an expelled member was held entitled to maintain an action asking a declaration that the rule under which he was expelled was ultra vires and an ancillary injunction. It is,

(1) 14 Ch. D. 482, 491. (2) [1911] 1 Ch. 540.

however, true that in the judgment of Buckley L.J. there are sentences (1) which suggest that an action in which the relief was based upon the construction of the rules would be one that it would not be possible for the Court to entertain, and he relies on the case of *Chamberlain's Wharf* v. *Smith* (2) as an illustration of this principle. The words I refer to are as follows: "The point in *Chamberlain's Wharf* v. *Smith* (2) was as follows: There was a rule in that case which fell within the words of s. 4, 'agreement concerning the conditions on which any members . . . . shall sell their goods.' For a breach of the rule the plaintiffs were expelled in exercise of a power of expulsion in the rules. They asked for an injunction to restrain the defendants from acting on the resolution, alleging that they had not had a fair opportunity of being heard in their own defence. Their case, therefore, was that they had not broken the rule. To adjudicate in the action would have involved an investigation whether they had broken it or not. This the Court could not entertain." I differ, with the greatest hesitation and reluctance, from any statement of the noble and learned Lord, but I cannot accept this view of the statute and the authorities. *Chamberlain's Wharf* v. *Smith* (2) was clearly based on the wider view of *Rigby* v. *Connol* (3): see Lord Alverstone M.R. at foot of p. 612; and Collins L.J. at p. 615. And this view cannot, after the decision in [1905] A. C., be any longer accepted. To construe a rule is not directly to enforce any agreement between the members, and I am unable to see any reason why the words of the statute should be so extended as to exclude a trade union itself or any of its members from obtaining the advantage of having obscure words construed by a wholly independent and impartial tribunal. I have not referred to the case of *Wolfe* v. *Matthews* (4), for that depends upon considering whether relief by way of injunction is a method of directly enforcing an agreement, and that question does not admit of a complete and comprehensive reply. It depends upon the

(1) [1911] 1 Ch. 569.
(2) [1900] 2 Ch. 605.
(3) 14 Ch. D. 482.
(4) 21 Ch. D. 194.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Buckmaster.

circumstances, but for reasons I have already given such an injunction as is here sought is not a direct enforcement of any of the forbidden provisions.

Turning now to the words of the rule, I find it difficult to construe them as the appellants desire. It seems to me that the meaning of the words is that there must be a system which includes as part of its terms the allotment of shares and also makes no provision for the workman holding more than a minority. I cannot, on any other reading, give an intelligible meaning to the words "when such system makes provision for the operatives holding only a minority of shares in the concern," for these words seem to me to involve the proposition that the system itself provides for the allotment of some shares. And if this be right, the matter ends, because the present system makes no provision for the allotment of shares at all. I think also there is difficulty in showing that a workman is working on a system of co-partnership at all when the terms of his employment as here create neither an obligation nor a right to obtain any partnership interest, although I appreciate the value of the argument that when once he has accepted the certificate he is then working on a system of which the certificate forms part. I do not, however, think it is necessary to decide this point. Finally, it was urged that this scheme was obviously within the object against which the rule was aimed, and I think this would be true. The right to give and to withhold labour has on certain occasions unfortunately proved to be the only means of obtaining the redress of grievances, and it is plain that the exercise of such a right is impeded by the interest of the workman becoming entangled with that of the owners of the works. It is out of place to discuss here the wisdom of the plan that seeks to keep these interests apart. The trades unions, looking to the care of their members, think that they are best protected by regarding the two interests of employer and employed as distinct, and they try to prevent them merging into one. But this rule, though doubtful words may be illuminated by considering the purpose for which they are used, cannot be stretched

so as to make it reach far enough to cover all the purposes which may have prompted its introduction. It must be construed as it is found, and so regarded it does not support the appellants' contention.

In the second appeal the circumstances are the same, except that the rule relied on is different; so far as material it runs in these words: "Rule 31.—Piecework and Premium Bonus. Any member proved to the satisfaction of the E. C. District Committee or lodge to be working against the interests of the Society by working on the Premium Bonus System . . . may be fined or expelled as the E. C. District Committee, or lodge may determine." The only definition offered of "premium bonus system" includes the idea that the bonus is a reward bearing direct relation to work done, and I see no other possible explanation of the phrase. The system in this case has no such provision, and the rule, therefore, cannot apply.

LORD ATKINSON. My Lords, the first appellant is a trades union duly registered under the Trades Union Act of 1871, and the other appellants are officials connected with it. The respondents are three workmen who have long been members of this trades union. Their cases are practically identical on the facts, and that of Frederick Braithwaite has, therefore, been taken as a specimen of all the three.

I assume that the trades union is an illegal association being in restraint of trade. Though the purposes of the union may be in restraint of trade, that fact does not, under the Trades Union Act of 1871, make them unlawful so as to render void or voidable any of their agreements or trusts. The fourth section of this statute provides that nothing shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing, or the recovery of damages for the breach of, any of the agreements mentioned in the five sub-sections of this section. The section further provides that though these agreements are unenforceable in the manner mentioned, nothing in the section is to be deemed to make them unlawful.

The agreements mentioned in sub-s. 1 are those made

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

between members of a trades union as such concerning the conditions on which members for the time being of such trades union shall or shall not (amongst other things) employ or be employed.

The agreements mentioned in sub-s. 3 (*a*) are those for the application of the funds of a trades union to provide benefits to members.

The appellants have appealed from a judgment and order of the Court of Appeal dated June 13, 1921, by the latter of which it was merely ordered that the appellants should be perpetually restrained from expelling the respondents or any one of them from the appellant society, on the ground that their participation in the co-partnership scheme of Lever Brothers, Ld. (the employers of the respondents), justifies their expulsion under r. 32 of the rules of the appellant society, and from taking and continuing, directing or permitting or suffering to be taken or continued any step with a view to effect such expulsion.

This is the only relief given to the respondents, and it is this relief the appellants contend the respondents are, by s. 4 of this Act, debarred from seeking in a Court of law.

The respondents never were in fact expelled from the society. Their expulsion was threatened, but not carried out. The effect, therefore, of this order is not to restore the respondents to a position which they occupied but were deprived of, but rather to quiet them in the enjoyment of the position they occupied before the threat was made, a position which they still continue to occupy with, in all cases, all their previously existing rights, privileges and disabilities. Any legal proceedings any of them could have instituted before the threat they can still institute. Any legal proceeding they were disabled from bringing before the threat they are still disabled from bringing; and yet it is contended that a legal proceeding instituted by a person which secures for that person continuance in a position in which he is disabled from enforcing a particular contract is a proceeding directly enforcing that very contract. That appears to me to be, and I hope will always appear to me to be, a most illogical

conclusion. In one sense the inflicting a pecuniary or other penalty upon a man for not doing something he is by contract or duty bound to do amounts to enforcing that contract or duty, because he will probably keep the contract or discharge the duty to avoid being mulcted in damage, but that is obviously not the sense in which the words "directly enforcing" are used in s. 4 of the Act of 1871, since the indirect enforcement of an agreement by recovering damages for its breach is treated as a separate matter uncovered by the words "directly enforcing."

I do not think Lord Macnaghten, in the statement made in his judgment in *Yorkshire Miners' Association* v. *Howden* (1), ever meant to suggest that the word "directly" was to have no force given to it, or that the words "directly enforcing" include any kind of indirect enforcement of a contract other than a suit to recover damages for the breach of it.

Of course when a workman becomes a member of a trades union he contracts to be bound by the rules of that union, and the contracts which he enters into with the union or with each of his fellow-workmen are to be found, if found at all, in those rules. I accordingly asked Mr. Jenkins, who so ably and frankly argued this appeal for the appellants, what was the agreement under s. 4, sub-s. 1, which he contended was directly enforced by this proceeding to obtain the injunction granted, and he replied it was a contract covered by r. 32 to the effect that the respondents would respectively not be entitled while continuing to be members of the union to work under such a system of co-partnership as is mentioned in r. 32. That answer necessitates the inquiry: (1.) whether the scheme of co-partnership established by Lever Brothers, Ld., is substantially identical in its nature with the system mentioned in this rule; and (2.) whether the employees of Lever Brothers, Ld., can be said to work on such a system.

In my view, to satisfy the words of this rule, it would be necessary that the employee should by his contract of service

(1) [1905] A. C. 256, 264.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

be bound to work on the system mentioned. If the employee, while continuing in his employment, entitled to receive his wages and all the other benefits his contract of employment secures to him, be left quite free to adopt—or not to adopt—a co-partnership scheme which the generosity of his employer offers for his adoption with the consent mentioned, he does not, I think, work on a co-partnership system within the meaning of Rule 32. Again, the system of co-partnership which offends against this Rule 32 must be one which provides, i.e., requires, that every workman employed in the concern should acquire shares in it, but not enough shares to secure that the operatives as a body shall hold more than a minority of those shares. The rule is obviously directed against a system of co-partnership which would prevent by its very terms the operatives becoming shareholders in a concern to such an extent as to acquire control of it. Though the scheme established by Lever Brothers does not make the workers partners in the concern in the strict sense of the word (art. 16 of the scheme prevents that), yet as those workmen who adopt the scheme share in the profits of the company, and as the scheme is styled by its authors a co-partnership scheme, one may well assume that it truly answers that description. It does not require, however, that any employee shall acquire or hold a single share in the company. It does provide that if he be not less than twenty-two years of age, he may, if so disposed, apply to the trustees that a partnership certificate may be issued to him under the trust, which application the trustees may in their discretion grant or refuse. Should he obtain this certificate he will be entitled to receive out of the profits of the concern interest on the amount for which the certificate is given. When he has got this certificate he may in any year take a preferred ordinary share in the company in lieu of this interest, or he may take the interest in cash, and he may take it in shares one year and the next year in cash if so disposed.

The amount of the partnership certificates which an employee may receive is regulated by his wages and

according to the class to which he belongs. In the staff class (to which the respondents would belong, their wages being, we have been informed, about 4*l.* a week), if the salary be 200*l.* or upwards, the amount of the certificates would be 800*l.* If less than 200*l.* and not less than 100*l.*, then 400*l.* If less than 100*l.*, then 200*l.* A partnership certificate may be cancelled in the manner prescribed for misconduct of the kind mentioned on the part of the holder. But the application for a grant of such certificate is not made in any way a condition of an operative's employment. It is wholly apart from and does not affect his contract of employment, or the wages or other conditions with which that contract deals.

Clause 3 of the scheme provides that the partnership certificates issued from time to time and outstanding shall in no case exceed in nominal amount 1,000,000*l.*, but it further provides that this limit may be extended with the consent of the holder of a majority of the shares of the company.

Having regard to the large capital of Lever Brothers, Ld., it would I think be impossible for the operatives of the concern ever to hold more than a minority of the shares of the company.

Having regard to the above-mentioned reason, I am clearly of opinion that the co-partnership scheme established by Lever Brothers does not come within the provision of Rule 32, and that the agreement mentioned by Mr. Jenkins, which he says the injunction granted in this case directly enforces, is not shown ever to have existed. The appeal, therefore, in my opinion, fails so far as it is based upon s. 4, sub-s. 1, of the Trades Union Act of 1871, and Rule 32.

Now as to sub-s. 3 (*a*) of that section. It is stated in the third of the rules of the appellant society that the object of the society is to raise funds for the advancement, protection and organization of trade, for the political purposes to which the Trades Union Act of 1913 applies, and then for, amongst other things, the mutual support of its members in cases of sickness, accident and superannuation; for the burial and cremation of members and their wives, for loss of tools, and

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

for assistance to members out of work. By Rule 8 it is provided that the contribution of members to the funds of the society shall be of the amounts named. The succeeding rules provide that the several benefits mentioned shall be paid a sum in certain events. The source from which money must be drawn to make these payments must, in the nature of things, be the funds raised by these contributions in addition to fines.

Mr. Jenkins' argument on this part consisted to some extent of a strong and repeated appeal to your Lordships not only to approve of the decision pronounced by Sir George Jessel, in *Rigby* v. *Connol* (1), but to adopt and apply the principles laid down in that judgment in language which has by no means escaped criticism. If one turns to the pleadings in that case one finds that the plaintiff was expelled from his trade union for having refused to pay a fine of 5*l.*, inflicted upon him by them for having, as they alleged, in breach of their seventy-third rule, bound his son as an apprentice in a "foul" shop, i.e., a shop where non-unionists were employed. The plaintiff denied that this shop was a foul shop, refused to remove his son, and refused to pay the fine. Rule 73 ran thus: "Any journeyman binding his son in a foul shop shall be fined 5*l.* and not be entitled to any benefit until he has paid his fine and contributed twenty-six weeks according to rule." In his statement of claim he prayed that a declaration might be made that as long as he conformed to the rules of the society, which he thereby offered to do, he was entitled to participate in its rights, privileges and benefits, that the pretended expulsion of him was invalid, that the defendants might be restrained by injunction from excluding him from this participation, and he then claimed to recover damages for his alleged improper expulsion. The main point relied upon by the defendants in their defence was that the fine imposed by them was properly imposed, and that if the plaintiff was dissatisfied with them respecting it, and with their action in expelling him for not paying it, he should have appealed to a general meeting of the society,

(1) 14 Ch. D. 482.

that he had no right to the relief he sought from the Court, and that the Court had no jurisdiction to entertain the action. This means that the infliction of this fine and the expulsion for the non-payment of it was a matter of internal domestic management of the affairs of the union. The declaration asked for was of a very peculiar character, and of course the claim for damages was prohibited by s. 4, sub-s. 1, of the Act of 1871, so that, having regard to the relief sought by the plaintiff in the action, and to the grounds upon which it was sought, there is nothing inconsistent in approving of the dismissal of the action while disapproving of the course adopted by the learned Master of the Rolls and of the grounds stated by him on which he justified it. Several of his critics, I think, took that course. At p. 488 of the report he said: "The present Plaintiff certainly does not state in his statement of claim that there is any property at all here, and I think that that is a fatal objection to the statement of claim altogether, and I might, if I thought fit, dismiss the action simply on that ground. He states nothing but that there is an association which he calls a 'Trades Union'—the 'Journeymen Hatters' Fair Trade Union'—as governed by rules. He says that he has been a member, and that he has been unfairly and improperly expelled, but he does not allege there is any property of any kind or description belonging to the union, or that he is entitled to any share of it. That is, however, a very technical ground, and I intend to base my judgment on the larger ground that if he stated fully the position and rules of this trades' union to which he belonged, the result would have been the same, for the reasons I am about to state." After dealing with the history and objects of the statute of 1871, the learned Master of the Rolls, at p. 490, says: "I am satisfied that the agreement contained in the rules is an agreement to provide benefit for members, and that, if I decide in favour of the Plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less." Well might Lord Halsbury say of this judgment, as he did say of it in *Yorkshire Miners' Association* v. *Howden* (1): "I am bound, however, to say if that decision ever came up for review I think it would have to be considered whether it does not strike the word 'direct' out of the statute."

In *Wolfe* v. *Matthews* (2) certain members of a trades union claimed an injunction to restrain other members of the union from carrying out a scheme for the amalgamation of their union with another trades union. A preliminary objection was taken by the defendants that the action was an attempt to enforce an agreement for the application of the funds of the plaintiff's union intended to provide benefits for its members. They cited and relied upon *Rigby* v. *Connol.* (3)

Fry J., in giving judgment, said (4): "Now it is plain that this is not an action to recover damages for the breach of an agreement, neither is it, in my judgment, an action to directly enforce an agreement, which proceedings are alone mentioned in the 4th section. An order that the defendant should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of money to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement." He overruled the preliminary objection.

The learned judge then took a case as an example of the principle he had applied in his judgment. He said: "To take a simple case, if there is a contract by A. to pay 100*l.* to B., that contract is directly enforced by a judgment of the Court directing A. to pay to B. And the contract is only indirectly enforced or not at all by a judgment restraining A. from paying the money to some one else. It is only by a stretch of language that

(1) [1905] A. C. 256, 261.
(2) 21 Ch. D. 194.
(3) 14 Ch. D. 482.
(4) 21 Ch. D. 196.

such an order can be said to enforce A.'s contract; the utmost that can be said is, that it is then more likely that A. will pay to B."

Lord Davey, in a dissenting judgment in the *Yorkshire Miners' Association* v. *Howden* (1), criticises this illustration adversely. He says if the learned judge meant by 100*l.* an ear-marked bag of sovereigns which A. had contracted to deliver to B., and no one else, an action to restrain A. from delivering it to a third person would clearly be one directly enforcing that agreement. That criticism may be sound or unsound, but on the other side Lord Halsbury, in the same case at p. 261, states distinctly that in his opinion the decision of Fry J. was right, and extracts from it the passage I have already extracted and approves of it.

Lord Lindley, dealing with *Wolfe* v. *Matthews* (2) says: "It came before Fry J., in 1882, in *Wolfe* v. *Matthews* (2), and was decided in accordance with the above view, and so far as I know this case has never been questioned and has always been considered right. A similar view was taken of the Act in Scotland in *M'Laren* v. *Miller*." (3) I think *Wolfe* v. *Matthews* (2) will survive Lord Davey's criticism and is entitled to be treated as a safe authority to rely upon, and be guided by, notwithstanding that the principle on which it is based is considered to be in conflict with that upon which the Master of the Rolls's decision was rested in *Rigby* v. *Connol.* (4) Lord Macnaghten after quoting the passage from Sir George Jessel's judgment which I have already quoted, says: "There I think the learned judge departs rather widely from the language of the enactment. If the Act said that no Court should enforce an agreement to provide benefits for members there would be an end of the matter. But the Act does not say that, or I think anything like it. It is not every trade union agreement that the Court is forbidden to enforce. The effect of Sir George Jessel's observations in conjunction with the cases of unenforceable contracts

(1) [1905] A. C. 266, 273, 282, 283.
(2) 21 Ch. D. 194.
(3) (1880) 7 R. 867.
(4) 14 Ch. D. 482.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

specified in the Act makes trade union agreements one and all alike unenforceable. There is really nothing left. The Act, however, proposes only to strike at certain agreements, leaving, at least apparently, the jurisdiction of the Court untouched as to everything else." He then adds, quite consistently, as I have already sought to show: "In making these remarks I do not wish to be understood as expressing a doubt as to the correctness of the actual decision in *Rigby* v. *Connol*." (1) But the actual decision was merely a dismissal of the action. Lord Lindley said: "The cases in which the Court has refused to restore expelled members, namely, *Rigby* v. *Connol* (1); *Chamberlain's Wharf* v. *Smith* (2), are also distinguishable" (from *Wolfe* v. *Matthews*). "The object of the action in each of those cases was directly to establish and enforce the plaintiff's right as a member of the trade union to the benefits conferred by the rules." Such are the direct criticisms expressed in words in *Yorkshire Miners' Association* v. *Howden* (3) on *Rigby* v. *Connol* (1) by the noble Lords, but the most effective and destructive criticism of it is in reality the judgment of this House in the *Yorkshire Case*. In that case the trade union was established for certain objects, including payment out of their funds to members locked out or on strike. The entire amount of their funds was to be applied in carrying out the specified object according to the rules. The union misapplied part of the funds by making payments of strike money in cases not authorized by the rules. A miner named Howden, a member of the association, brought an action against the association and some of the officials, claiming an injunction to restrain them from misapplying the fund of the association by payment of strike money contrary, as was alleged, to the rules: and the decision of the House was that the action was not instituted with the object of directly enforcing an agreement for the application of the funds to provide benefit to members within the meaning of the 4th section of the Act of 1871, but to prevent a misapplication of the funds and

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.
(3) [1905] A. C. 256.

was, therefore, maintainable. The judgment of the Court of Appeal (1) was affirmed.

The last case I think it necessary to refer to is that of *Osborne* v. *Amalgamated Society of Railway Servants*. (2) In that case the plaintiff, who had been expelled by an order of the defendant union of which he was a member, brought an action for the purpose of obtaining the rescission of the resolution expelling him and an order restoring him to membership of it, and his right and benefit as such. The defendants in their defence took a preliminary objection founded, first, on the ground that the contract relied upon, which was constituted by the rules of the society, was an illegal one and incapable of being enforced at common law; and, second, that the action was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits to members within the meaning of s. 4, sub-s. 3, of the Trades Union Act of 1871. Cozens-Hardy M.R. (as he then was) in giving judgment, said: "The contention of the defendants involves two propositions—(*a*) that the society is at common law an unlawful association, and (*b*) that this action is a legal proceeding which no Court can entertain having regard to s. 4 of the Act of 1871. If either of these propositions is not well founded the defendants fail, and the action must proceed to trial in the usual way. Warrington J. held that both propositions were established, and accordingly dismissed the action with costs. It is necessary to consider these propositions separately." The first proposition mentioned by the learned judge which was held not to have been established does not affect the present case. The Master of the Rolls then deals with the second proposition, criticises the decisions in *Rigby* v. *Connol* (3) and *Chamberlain's Wharf* v. *Smith* (4), the main, if not the only, authorities relied upon by the appellants in this case and in reference to the first, says: "I feel no doubt that the decision of Sir George Jessel dismissing the action was perfectly correct. But there are observations in the judgment

(1) [1903] 1 K. B. 308.
(2) [1911] 1 Ch. 540, 551, 555.
(3) 14 Ch. D, 482.
(4) [1900] 2 Ch. 605.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Atkinson.

of Sir George Jessel which seem to greatly enlarge the operation of s. 4, and in effect to exclude the intervention of the Court in any question arising upon the agreement constituted by the rules." He further said that, in the second case, which arose upon s. 4, sub-s. 1, the Court of Appeal substantially followed *Rigby* v. *Connol* (1), but they did not discuss the general observations of Sir George Jessel, and he ultimately held that the second of the above-mentioned propositions as well as the first could not be maintained. Fletcher Moulton L.J. (as he then was)(2) also deals with these two cases and as to *Rigby* v. *Connol* (1) said: "I think that the explanation of this decision is to be found in the nature of the relief asked. Had the claim of the Plaintiff been limited to his restoration to membership the result of the case might have been different. But it is clear that the learned judge considered the claim in substance to go far beyond this and to be an attempt to obtain an order of the Court giving him a share in the assets of the union." He then quotes the passage from Sir George Jessel's judgment which I have already quoted and says: "If the learned judge is to be understood to have decided that the mere declaration that the plaintiff in that case was entitled to membership would amount to decreeing the specific performance of the whole contract of membership, as some of the expressions in his judgment would seem to imply, I respectfully differ from that decision." The learned Lord Justice then refers to *Chamberlain's Wharf* v. *Smith* (3) and points out that the plaintiff company had been a member of a voluntary association, the members of which were dock companies and tea warehousekeepers; that its object was to compel its members to observe certain scheduled rates on tea and none other, and that the whole of the rules were directed to securing this. He then said: "It would not be too much to say that the whole agreement of membership might be aptly described in the words of s. 4, sub-s. 1, as an 'agreement between members of a trade union as such, concerning the conditions on which

(1) 14 Ch. D. 482. (2) [1911] 1 Ch. 561, 563.
(3) [1900] 2 Ch. 605.

any members for the time being of such trade union shall or shall not sell their goods or transact business.'" The committee found that the plaintiff departed from these rules and expelled him. The defendants claimed that the Act of 1871 had not given the Court any power to entertain the clause, founding themselves solely on s. 4, sub-s. 1, of the Act of 1871. The Court of Appeal held that the contention of the defendants was well founded.

Buckley L.J. in his judgment deals (1) with this point on s. 4, sub-s. 3 (*a*), tersely but with great lucidity, and with convincing logic. He said: "The jurisdiction of the Court is therefore not excluded by any absence of rights of property. But it is said that an order to declare his expulsion ultra vires and a proper consequential injunction will be an enforcement of the agreement in the rules to apply the funds to provide him with benefits. I cannot follow the contention. The plaintiff was a member of a society with (amongst others) rights as regards those benefits which were unenforceable. How can an order to restore him to membership do more than make him what he was before, namely, a member with the same unenforceable rights? How does such an order enforce those rights? What benefit in the application of the funds is it that the order compels the society to give him? Obviously none. If he succeeds in the action he merely resumes the position in which he stood before. His rights by way of benefit are neither greater nor less than before his expulsion. The whole answer to the contention on this part of the case may be summarised in a sentence. An order to restore to membership with unenforceable rights is no order to enforce those rights." I think that answer is thoroughly sound and absolutely sufficient. It is founded on good sense and good reason and is supported by every reliable authority that I have referred to. On the whole, therefore, I am clearly of opinion that the decision of the Court of Appeal which has been appealed from was right on principle and authority and should be affirmed, and this appeal dismissed with costs.

(1) [1911] 1 Ch. 567.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

LORD SUMNER. My Lords, I agree that there is jurisdiction to entertain this action. To hold otherwise would strike the word "directly" out of the statute. One does not demand the precision of an Act of Parliament in the rules of a trade union, but not to require that a penal rule should be definite in its language and should be strictly construed, would be unfair to the member. Each member ought to be able to tell from the rule what acts on his part may bring expulsion upon him.

I am not satisfied that the benefit scheme in question is properly described either as a co-partnership scheme or as a premium bonus scheme. It is said to be both, and the possibility of such a double description is strong ground for saying that both the descriptions are too indefinite for it to be either. Co-partnership here does not, of course, mean that the workman and the employer are legally partners, but, in the absence of evidence showing that the word has become a definite term of art, I think it implies sharing losses as well as profits, and therefore does not apply to the scheme in question. Still less can the scheme be called a premium bonus scheme. The money paid is not an addition to the wages as part of the earnings of the wage-earner under his contract of employment. He does not work on the system; he shares and invests under it. The payment arises out of a voluntary gift; out of a participation in profits earned by the company, which is dependent on the donee's prior good character and his present engagement to do his best in future for the company, and is given by the donor. Quoad ultra the workman becomes a shareholder.

Neither, in my opinion, does the scheme provide that workmen shall hold only a minority of the shares. It provides nothing about it. I daresay that under the scheme they never will hold a majority, though that is hardly a mathematical certainty, but the result of the working of a scheme is one thing, and the provisions of the scheme, or the absence of them, another. The rule refers to providing and I think must be construed as it stands.

My Lords, I am asked to state that my noble and learned friend, Lord Carson, concurs in the opinion of my noble and learned friend, Lord Buckmaster.

LORD WRENBURY. My Lords, in these cases there are two questions. The appellants say that the actions will not lie—that the Court has no jurisdiction to entertain them. The first question is whether that is so.

This turns upon the provisions of the Trade Union Act, 1871. The effect of that Act is that while a trade union is left an illegal association at common law, its agreements nevertheless are, by s. 3, not by reason merely that they are in restraint of trade unlawful, but that this is subject always to the operation of s. 4, which provides that nothing in the Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of certain defined agreements. The result is that agreements which would have been unlawful are by s. 3 rendered lawful, but that nevertheless certain of these lawful agreements are unenforceable in some ways, leaving others enforceable in every way in legal proceedings.

In 1911, in delivering judgment in *Osborne's Case* (1), I discussed and expressed my opinion upon all the decisions which existed down to 1911 upon the question of the effect of the above enactments. I need not recapitulate that which I then said, but I desire to be taken as repeating in this House all that I said in the Court of Appeal, as if I now repeated it in this House. But this is subject to the following observations.

In the course of that judgment I was discussing *Rigby* v. *Connol* (2) and *Chamberlain's Wharf* v. *Smith.* (3) The former was an action in which the plaintiff was—or Sir George Jessel held that he was—enforcing an agreement to participate in the funds of the trade union. This was an action within s. 4, sub-s. 3, of the Act of 1871. The latter was an action in which the plaintiff was resisting his expulsion from the

(1) [1911] 1 Ch. 540. (2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.

H. L. (E.) 1922 — AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY. — Lord Wrenbury.

union in an action which fell within s. 4, sub-s. 1. With these in my mind I used language not sufficiently guarded —for I used words capable of being understood in a general sense where in fact they were used in a limited sense. At the same time I should have thought that any one would have understood them in the limited sense, for if they were of universal application I must have decided *Osborne's Case* the other way. At p. 569 I suggested that a second reason why *Rigby* v. *Connol* (1) could be upheld was "that to have restored the plaintiff to membership *in that case* would have involved an investigation of the ground for his expulsion, and that would have involved the question of the validity of the rule for breach of which he suffered." I did not intend to infer that such an investigation would be precluded in every case, but only that "*in that case*," i.e., in an action seeking relief by way of enforcement, such an investigation could not be made. Again, at p. 570, my words ought, on the like grounds, to be qualified as follows: The passage should run, "To adjudicate in the action would have involved an investigation *in an action of enforcement*, whether they (the plaintiffs) had broken it (the rule) or not. This the Court could not entertain *for the purpose of enforcing the rule*," and again, a few lines below, "Had the breach been established in the action the Court would have been called upon to decide that the expulsion was valid because the member had broken a rule which could be enforced against him. This the Court could not do *with a view to enforcing the agreement*." I ought to have made it plain that while the Court has, as in *Yorkshire Miners' Association* v. *Howden* (2), jurisdiction to maintain unimpaired the integrity of the agreement and may, and indeed must, for the exercise of that limited jurisdiction, construe the agreement, it cannot, whether by declaration or injunction, enforce the agreement, and for that purpose accept the duty of construing it.

The second observation is this: I desire to add something upon some words of Lord Macnaghten in *Yorkshire Miners' Association* v. *Howden* (3) with which I did not, I think, adequately

(1) 14 Ch. D. 482. (2) [1905] A. C. 256. (3) Ibid. 264, 265.

deal in *Osborne's Case*. Sect. 4 of the Act speaks of legal proceedings "instituted with the object of directly enforcing or recovering damages for the breach of" certain agreements. There are two ways of dealing with the non-observance of an agreement: the one is to compel the contracting party to perform it, the other is to make him pay damages for not performing it. These are the two things contrasted in the Act, and Lord Macnaghten is intending, I think, to point out that the use of the word "directly" does not infer or imply that a Court may indirectly enforce in the sense that it may make an order which by indirect means will have the effect of enforcing in fact—but means that neither by way of damages for not performing nor by order compelling performance may the Court interfere. But there is nothing in the Act to preclude the jurisdiction of the Court to uphold the integrity of the contract—to maintain unimpaired the contract as it stands—notwithstanding that it cannot enforce the contract as so maintained—so that, for instance, as in *Wolfe* v. *Matthews* (1) and *Yorkshire Miners' Association* v. *Howden* (2) it may restrain by injunction the improper application of funds, notwithstanding that it cannot compel their proper application.

Adopting the language of Lord Macnaghten in *Yorkshire Miners' Association* v. *Howden* (3) and adapting it to the present case: "The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules" —the object of the litigation is simply to prevent exclusion from sharing in the funds of the union, not to administer or apply them in any way.

The matter may be stated tersely, I think, by saying that it is not enforcing an agreement against a party to grant an injunction to restrain him from tearing it up. When the injunction is granted and obeyed, the result is simply to leave the relations between the parties in statu quo ante without enforcing them at all.

(1) 21 Ch. D. 194. [1905] A. C. 256.
(3) Ibid. 264, 265.

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

Lord Wrenbury.

My Lords, it is plain that under the Act of 1871 a trade union is not outside the jurisdiction of the Court altogether. It is within the jurisdiction as regards contractual obligations other than those specified in s. 4 of the Act of 1871, and is within the jurisdiction as regards the contractual obligations specified in s. 4 if the jurisdiction is invoked with an object which is not that of directly enforcing or recovering damages for breach of the agreement.

With these observations I turn to consider what is the matter of which the plaintiffs have complained, and what is the remedy which they ask the Court to apply.

The plaintiffs' case is that they, being members of an association in which they had rights of property, have suffered from an alleged expulsion from membership on grounds which are not to be found in the contract of membership as grounds for expulsion. They seek, and seek only, to establish that their membership is unimpaired. They do not seek in any way to enforce their rights as members. They contend that the enforcement—whether direct or indirect—of an agreement must be the enforcement of some term of the agreement, and that their whole case is that there is nothing in the agreement which justifies the action taken against them. They rely not upon anything contained in the agreement, but upon the silence of the agreement in the matter in dispute. In acceding to the plaintiffs' application and granting the injunction, the Court, they say, is simply affirming that there is nothing in the agreement to justify expulsion ; it is not enforcing any portion of the agreement, but is acting on the footing that something is not in the agreement. My Lords, in my opinion, the plaintiffs are right in this contention. A declaration that an agreement is such as that a man is a member and an injunction in support of the declaration are not enforcing an agreement to make him a member, or enforcing any rights which he has as a member.

The appellants' counsel, on being asked the question, answered plainly that his contention was that no member of a trade union can restrain by injunction his expulsion from

the union. My Lords, I think it well to say plainly that in my opinion this contention is absolutely untenable. If his action is confined to maintaining the contract unimpaired without enforcing it, there is nothing in the Act to stay the Court from upholding it.

This being so, the second question arises, and it is this: Does this contract contain a power to expel which in the facts is exercisable against the plaintiffs?

This turns upon Rule 32 in *Braithwaite's Case* and Rule 31 in *Ashley's Case*.

Rule 32 in *Braithwaite's Case* is not complete or grammatical as it stands. It can be made complete by inserting the words "that he is" before "working," so that it will read that it shall be competent to expel any member upon proof "that he is working," etc., or by stopping at the word "member" in the third line and continuing at the word "working" in the last line but two, so that it will run "expel any member working," etc. At any rate, that is obviously what is meant.

In a popular sense, I daresay it may be said that the Lever co-partnership trust and scheme may be called a "Co-partnership system," and at any rate I will assume that it is such. But I cannot find that any employee of Lever Brothers is "working on" that system. He works, I conceive, "on" the terms on which he is employed. It is no part of those terms that he shall have any interest in the scheme. The fact is that if he satisfies certain conditions and makes a certain application, and if the trustees decide that he is entitled to the issue of a partnership certificate, he will obtain one. He is a person who under circumstances is entitled to a certain gratuity. That does not fall within the words "working on" the system. Further, the system which falls within the rule is one which "makes provision for the operatives holding only a minority of the shares in the concern." This obviously means that the system referred to must not be one in which the operatives can never be in a majority. There is no such provision in the scheme.

In Rule 31 in *Ashley's Case* the question turns upon the words "Premium Bonus System." This indicates a system

H. L. (E.) 1922

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS v. BRAITHWAITE.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS v. ASHLEY.

under which a bonus in addition to wages, in proportion to work done or time saved, is paid to the workman. There is nothing of that kind in this scheme.

My Lords, the injunctions granted in these cases have, I think, been rightly granted, and these appeals should be dismissed with costs.

AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS AND OTHERS *v.* BRAITHWAITE AND OTHERS.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1922.

GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS AND OTHERS *v.* ASHLEY AND ANOTHER.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1922.

Solicitors for the appellants: *Kinch & Richardson, for Charles Howard, Laycock & Co., Manchester.*

Solicitors for the respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

[HOUSE OF LORDS.]

PORTMAN AND ANOTHER . . . . . APPELLANTS; H. L. (E.)*

AND

VISCOUNT PORTMAN AND OTHERS . . RESPONDENTS.

1922

July 28.

Will—Gift of Heirlooms—To go and be held with Mansion House—"So far as the rules of law and equity will permit"—"To be held and enjoyed accordingly"—Shifting Clause in Settlement of Mansion House—Tenant in Tail—Vesting at Birth—Rule against Perpetuities—Destination of Heirlooms.

By her will dated in 1872 a testatrix (who died in 1877) devised an estate and mansion house to trustees upon trust for her niece for life, with remainder to the first son of her niece born in the testatrix's lifetime who should not be entitled to a certain barony for life, with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail, with remainder in trust for every other son of the niece born in the testatrix's lifetime, other than a son entitled to the barony, and the issue of every such son, so that every such son should take an estate for life with remainder to his sons and in default of sons his daughters severally and successively according to seniority in tail, with remainder to every son of her niece born after the death of the testatrix severally and successively according to seniority in tail, with remainders over. The will also contained a shifting clause providing that, if any son or remoter issue of the niece should succeed to the barony after becoming entitled in possession to the estate, then the trust declared for the benefit of the son or remoter issue so becoming entitled and of his issue male and female should cease and determine and the estate go over as if he were dead without issue of his body.

By his will dated in 1874 the testatrix's husband (who died in 1880) settled chattels "to go and be held so far as the rules of law and equity will permit with the mansion house . . . . as heirlooms, and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said mansion house," and other chattels "to go as heirlooms so far as the rules of law and equity will permit" with the estate.

On the death of the testator's niece in 1899 her second son succeeded to the estate and mansion house as tenant for life, and he had a daughter born in 1903 who thereupon became tenant in tail in remainder. In 1919 he succeeded to the barony and the estate and mansion house then passed by virtue of the shifting clause to the third son for life with remainder to his eldest son in tail:—

Held, that the shifting clause was void as regards the chattels by reason of its transgressing the rule against perpetuities, and that the use, in the

* *Present:* VISCOUNT BIRKENHEAD, L.C., LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD BUCKMASTER.

H. L. (E.)
1922
PORTMAN
v.
VISCOUNT
PORTMAN.

settlement of the chattels, of the words " so far as the rules of law and equity will permit " did not avail to prevent this.

Lord Scarsdale v. *Curzon* (1860) 1 J. & H. 40 and *Christie* v. *Gosling* (1866) L. R. 1 H. L. 279 applied.

Harrington v. *Harrington* (1871) L. R. 5 H. L. 87 explained.

Held, therefore, that the chattels had vested absolutely in the daughter as tenant in tail in remainder at birth, subject to being divested by the birth of a brother, there being nothing in the settlement of the chattels to postpone vesting until actual possession of the estate and mansion house.

In re Lord Chesham's Settlement [1909] 2 Ch. 329 considered and distinguished.

Foley v. *Burnell* (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319 applied.

Decision of the Court of Appeal [1921] 2 Ch. 491 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Eve J. (2)

The question for decision on this appeal was whether certain pictures, plate, furniture and other chattels bequeathed by the will of the late Colonel Francis Vernon Harcourt to go and be held " so far as the rules of law and equity will permit " as heirlooms with a mansion house and estate known as Buxted Park now belonged absolutely to the infant respondent the Honourable Selina Lusia Portman subject only to be divested by the birth of a son to her father the respondent the Right Honourable Henry Berkeley Viscount Portman and subject to the life interest of the said respondent Viscount Portman therein, or whether the said chattels now belonged to the appellant the Honourable Claud Berkeley Portman for his life and after his death to his son the appellant Edward Claud Berkeley Portman absolutely, the said appellants being now entitled to the said mansion house and estate successively as tenant for life and tenant in fee simple in remainder.

Eve J. decided this question in favour of the said respondents and his decision was affirmed by the Court of Appeal by a majority (Lord Sterndale M.R. and Warrington L.J.; Younger L.J. dissenting).

The facts are fully stated in the reports before Eve J. and the Court of Appeal and sufficiently appear from the judgment of the Lord Chancellor.

(1) [1921] 2 Ch. 491. (2) [1921] 1 Ch. 187.

April 3; June 19, 20, 22. *Maugham K.C.* (with him *Whinney*) for the appellants. The result of the decision of the Court of Appeal is to defeat the intention of the testator, since neither of the respondents who have been held entitled to the chattels satisfies the condition of the gift in the testator's will—namely, of being for the time being entitled to hold and enjoy the mansion house. The first respondent has ceased to fulfil the condition and the second respondent never has fulfilled it and never can. If the testator's gift of chattels may offend against the rule against perpetuities it is bad, but in the appellants' submission upon its true construction it cannot. The shifting clause in Lady Harcourt's will is limited to realty and as regards realty it is good, because a conditional limitation after an estate tail which must operate, if at all, during the continuance of the estate tail is not too remote, since the tenant in tail can destroy it at any time by barring the entail: Gray on Perpetuities, 3rd ed., p. 383, paras. 443–449; *In re Parker* (1); *Hogg* v. *Jones*. (2) Inasmuch as the tenant in tail becomes the absolute owner of the chattels subject to the clause of defeasance and the barring of the entail will eo instanti put an end to the trusts of the chattels, why should not the same principle apply as regards the chattels? In *Carr* v. *Erroll* (3), in which a similar clause occurred, the same point might have been argued, but no one there contended that there was anything which offended against the law of perpetuities.

There is no case which even suggests that there can be a perpetuity as regards chattels when the owner of the preceding interest in the chattels can by his own volition become absolute owner of them.

Assuming that the appellants are wrong in this contention: where the expression which a testator uses is ambiguous, that is, is fairly capable of two constructions, one of which would effect the testator's intention and the other of which would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest:

(1) [1910] 1 Ch. 581, 584. (2) (1863) 32 Beav. 45, 52.
(3) (1807) 14 Ves. 478, 481.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN.

Pearks v. *Moseley*. (1) Especially is this the case where the testator shows by other provisions in his will or by an express reference to the rules of law and equity that he has the rule against perpetuities in his mind: *Christie* v. *Gosling* (2); *Martelli* v. *Holloway* (3); *Harrington* v. *Harrington*. (4) The clear intention expressed in the testator's will is that the chattels are, as long as the rules of law and equity will permit, to be held and enjoyed in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the mansion house, and there is no warrant for writing out the limitations of the realty as applicable to the chattels in such a way as to create a perpetuity which the testator never intended. If there had been an express shifting clause in the testator's will it would have been bad. If by directing that the chattels shall follow the devolution of the real estate the testator is to be treated as having in effect made two dispositions of the chattels, then the proper course is, as suggested by Lord Cairns in *Harrington* v. *Harrington* (5), to make the clause of defeasance apply to each person who takes an interest. It is not a right mode of construing the will to write out the gift of chattels exactly in the terms of the gift in Lady Harcourt's will and then add the clause of defeasance. If the gift of chattels is treated as a gift to a series of sons fulfilling a certain condition to be ascertained by events then, Lord Portman being a life in being at the testator's death, there is no perpetuity involved in saying that his interest has come to an end. Lord Westbury definitely decides this point in the appellants' favour and Lord Cairns inclines to the same opinion. It is enough to say that the appellants have become absolutely entitled to the chattels within the period allowed by law. Further, there is a sufficient indication on the part of the testator that these heirlooms should go with the mansion house and vest only in a tenant in tail in possession: *In re Lord Chesham's Settlement*. (6) That case is distinguishable from

(1) (1880) 5 App. Cas. 714, 719.
(2) L. R. 1 H. L. 279, 290.
(3) L. R. 5 H. L. 532, 548.
(4) L. R. 5 H. L. 87,102,106,107.
(5) L. R. 5 H. L. 87.
(6) [1909] 2 Ch. 329, 333.

Foley v. *Burnell* (1), which is remarkable for the difference of judicial opinion which it evoked and was decided by Lord Thurlow against the opinion of the majority of the judges who advised the Lords. *In re Lord Chesham's Settlement* (2) has been doubted in *In re Parker* (3); *In re Beresford-Hope* (4); and *In re Lewis* (5), but in each of those cases there was a sufficient ground for distinction. On the other hand it has been followed in *In re Fowler* (6) and *In re Duckett.* (7) In the appellants' submission it was rightly decided and its authority has not been seriously impugned. It follows that the chattels do not remain with Lord Portman, but pass to the person in possession, the first appellant.

Tomlin K.C. (with him *H. T. Method*) for the respondents. The rule that an estate or conditional limitation after an estate tail is not obnoxious to the rule against perpetuities is a special rule confined to limitations of real estate and has no application to the present case. The whole of the law on this subject is stated by Wood V.-C. in *Lord Scarsdale* v. *Curzon.* (8) Personal and real estate can be kept together to a limited extent only and the phrase "so far as the rules of law and equity will permit" has been employed for the purpose of showing that a different effect is given to the same limitations as regards the two properties. It means: "so far as the nature of the property permits." It cannot be used for the purpose of turning an executed trust into an executory trust so as to enable the Court to mould it in such a way as to give it validity. The appellants are inviting the House by virtue of these words to prepare for the testator a new and better will to meet the events which have unexpectedly happened and to limit the defeasance clause so as to make it conform to the rule against perpetuities. That cannot be done. The defeasance clause is bad unless severable, and though the clause might be severable as between

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319; Romilly's Notes of Cases, 1.
(2) [1909] 2 Ch. 329, 333.
(3) [1910] 1 Ch. 581.
(4) [1917] 1 Ch. 287.
(5) [1918] 2 Ch. 308.
(6) [1917] 2 Ch. 307.
(7) [1918] 1 I. R. 110.
(8) 1 J. & H. 40.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN.

children and remoter issue it would still be bad, because there might be sons of the niece born after the testator's death. The effect of the testator's language is simply to settle these chattels on a referential trust: *Vaughan* v. *Burslem* (1); and the defeasance clause must be read as it stands. The appellants' real point is that this is not a gift by reference to the limitations of the realty, but is a gift to a succession of persons who fulfil a particular description. *Harrington* v. *Harrington* (2) does not assist the appellants. There the Lords were construing an express condition, as to which they did not all take the same view, but it was immaterial to decide the point, because they agreed that the respondent took on any view of the case. Lord Hatherley's observations, however, on the effect of the words "so far as the rules of law and equity will permit" are in point. Lord Westbury, in a dictum which it is difficult to reconcile with the well settled principle that the question of remoteness is not to be judged by the actual event, seems to give too great an effect to those words. Then it is said that the words "hold and enjoy" imply that the chattels shall vest only in a tenant in tail in possession. The words in *Foley* v. *Burnell* (3) are substantially the same as in this case, except that the word "possession" occurs there but does not occur here, yet it was held that the chattels vested in a tenant in tail in remainder; and see *Martelli* v. *Holloway*. (4) Either *In re Lord Chesham's Settlement* (5) is inconsistent with *Foley* v. *Burnell* (3) or it may be distinguished on rather fine and subtle grounds, but, in the respondents' submission, it is erroneous. It has never been directly followed except in *In re Duckett* (6) in Ireland and it was treated by Parker J. in *In re Parker* (7) as not attempting to alter the old line of authorities. See also Jarman on Wills, 6th ed., vol. i., p. 698, note (*f*); Davidson's Precedents, 2nd ed., vol. iii., Part I., pp. 495, 516.

(1) (1790) 3 Bro. C. C. 101, 106.
(2) L. R. 5 H. L. 87.
(3) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(4) L. R. 5 H. L. 532, 546.
(5) [1909] 2 Ch. 329.
(6) [1918] 1 I. R. 110.
(7) [1910] 1 Ch. 581.

[The Lord Chancellor said that their Lordships felt themselves bound by *Foley* v. *Burnell.* (1)]

[Counsel also referred to *Thellusson* v. *Woodford* (2) and *Milbank* v. *Vane.* (3)]

Maugham K.C. replied.

The House took time for consideration.

1922. July 28. VISCOUNT BIRKENHEAD L.C. My Lords, before I move the motion which I am about to move it has occurred to me that it might interest your Lordships to be informed as to the state of legal business in this House.

At the present moment the whole English List will be disposed of before your Lordships rise. The whole Irish business will be disposed of with the exception of two cases which have not been placed in the List for trial at the request of the litigants themselves, who have found a difficulty in attending in the existing situation in Ireland. There remain only three Scotch appeals, all of which are of very recent entry.

The situation then is that the English List is concluded, the Irish List is concluded, and there are only three cases which have just been set down by way of appeal.

This is, I think, the most satisfactory conclusion of your labours for a year which the records for many years present.

My Lords, this is an appeal from an order of the Court of Appeal dated July 5, 1921, affirming an order of Eve J. dated November 12, 1920.

The question between the parties is whether certain chattels bequeathed by the will of Colonel Francis Vernon Harcourt deceased now belong (as the Courts below have held) to the Viscount Portman for life with remainder over to his daughter subject to the chance that she may be divested by the birth of a son to her father, or on the contrary belong to the appellants, who are respectively the tenant for life and tenant in fee simple in remainder of Buxted Park mansion and estate.

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(2) (1805) 1 Bos. & P. (N. R.) 357.
(3) [1893] 3 Ch. 79.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

The history of the title so far as material is as follows: Lady Catherine Julia Harcourt, wife of Colonel Francis Vernon Harcourt, was tenant for life of the Buxted Park Estates, and subject to her husband's life estate if he survived her (as he did) she was entitled to settle the estates. She died on December 5, 1877, and by her will settled the property upon her niece, and her niece's children, in a manner which I shall find it necessary to set out more particularly hereafter. Colonel Harcourt died on April 23, 1880, and by his will the chattels now in question were bequeathed in a manner which directly refers to the devolution of the Buxted Park Estates.

Lady Catherine's niece was the wife of the Hon. William Henry Berkeley Portman, who in 1888 succeeded to the title of Viscount Portman. Lady Portman died on January 4, 1899. There were a number of children of the marriage of whom it is only necessary to mention three—the eldest son, the Hon. Edward William Berkeley Portman, who died on April 27, 1911, in his father's lifetime; the third (and second surviving) son, who succeeded to the title on his father's death in 1919; and the fourth (and surviving) son, who is the appellant, the Hon. Claud Berkeley Portman. The present Viscount Portman has an only child, the respondent, the Hon. Selina Lusia Portman; the Hon. Claud Berkeley Portman has an only son who is the second appellant.

Lady Catherine Julia Harcourt's testamentary dispositions so far as material were as follows: By her will dated May 23, 1872, she appointed, devised and bequeathed Buxted House and the Buxted Park Estate to trustees upon certain trusts which after her niece's death were expressed in these words: "In trust for the first or only son of my said niece born in my lifetime who shall not at the decease of my said niece be entitled in possession or in remainder immediately expectant on the decease of the said Lord Portman and William Henry Berkeley Portman"—that is, the first and second Lords Portman—"to their family Barony of Portman during the life of such son without impeachment of waste And from and after his decease In trust for his first and every other son severally and successively according to seniority in

tail with remainder In trust for his first and every other daughter severally and successively according to seniority in tail with remainder In trust for every other son of my said niece born in my lifetime other than a son for the time being entitled in possession or in remainder immediately expectant on the decease of the survivor of the said Lord Portman and William Henry Berkeley Portman to the said Barony and the issue of every such son so that every such son may take an estate for his life without impeachment of waste with remainder to his first and every other son severally and successively according to seniority in tail with remainder to his first and every other daughter severally and successively according to seniority in tail" with remainders over. The testatrix further declared "that if any son or remoter male issue of my said niece who by virtue of the limitations herein contained shall be or become entitled in possession to the said estate and hereditaments shall become entitled in possession to the said Barony then the trust hereby declared for the benefit of the son or remoter issue becoming entitled in possession to the said Barony shall cease and determine as if he were dead without issue of his body and then and thenceforth the said hereditaments shall go and be In trust for such person or persons as by virtue of the limitations herein contained would then be entitled as the person or persons next in remainder to the same hereditaments in case such son or remoter issue so becoming entitled to the said Barony were then dead without issue of his body."

This will was signed by Colonel Harcourt. Lady Catherine made six codicils to her will, but none of them is material and on her death the will and codicils were duly proved.

Colonel Harcourt made his will on January 3, 1874, and thereby made the following gifts in the event (which happened) of his surviving his wife: "I give and bequeath the Sèvres china flower stand given to the Rt. Hon. Robert Charles Banks Earl of Liverpool by the Emperor Napoleon the First and also a water color drawing of Athens by my said Wife and two water color drawings by T. M. Richardson given by me to my said Wife to go and be held so far as the rules of law and

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

equity will permit with the Mansion House called Buxted Park as heirlooms and to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said Mansion House. I also give and bequeath . . . . upon trust to permit all such plate and plated articles as are marked with an Earl's coronet or with the arms or crest of the Jenkinson or Medley families and also all linen belonging to my said Mansion House at Buxted to go as heirlooms so far as the rules of law and equity will permit with the Buxted Park Estate . . . . And I give and bequeath all the household goods furniture books pictures and china which shall be . . . . in and about my said Mansion House called Buxted Park . . . . at the time of my decease . . . . In trust to permit the said household goods furniture books pictures and china . . . . to go and be held as far as the rules of law and equity will permit with the said Mansion House called . . . . Buxted Park as heirlooms according to the limitations thereof . . . . which shall be . . . . subsisting under this my Will or otherwise howsoever at the time of my decease and to be held and enjoyed accordingly in succession by the several person or persons who shall be respectively entitled for the time being to hold and enjoy the said Mansion Houses."

The form of the third bequest was influenced by the fact that a mansion house called St. Clare belonging to the testator was settled by his will and the bequest combined the gifts relating to the two mansion houses.

Colonel Harcourt made four codicils to this will which are only material in this sense that three of them were made after the decease of his wife, and in one—namely, that dated May 1, 1879—he expressly ratified his will. On his death his will and codicils were duly proved and came into operation.

When Lady Portman, niece of Lady Catherine Harcourt, died the present Viscount Portman was the second son and consequently, under the limitations of Lady Catherine's will, he succeeded to the Buxted Park Estate as tenant for life. In 1919 on his father's death he succeeded to the Barony and thereupon the estate by virtue of the shifting clause in the

said will went over to the appellant the Hon. Claud Berkeley Portman for life, with remainder to his sons and daughters successively in tail, as is set out in the said will and declared by an order of Eve J. made on February 6, 1920.

When the appellant Edward Claud Berkeley Portman, the only son of the elder appellant, came of age the estate tail was duly barred by indenture dated January 17, 1920.

The question then arose which now falls to be decided by your Lordships: To whom upon the true construction of Colonel Harcourt's will the chattels, mentioned in the bequests which I have read, now belong. Eve J. and the majority of the Court of Appeal have held that the chattels belong to Viscount Portman for life, and subject thereto to his daughter, who is, however, liable to be divested in the event of a son being born to her father.

It is of course evident that Colonel Harcourt must have known the terms of Lady Catherine's will. He not only signed it, but the terms of his own will, which was in date later than hers, betray a detailed knowledge of the provisions of hers; indeed, some of the chattels which are now in dispute only pass under his will because she bequeathed them to him. Also after her death he made three codicils confirming his will; and in that which was made soon after her death he expressly takes notice of that event. The chattels at his own mansion St. Clare are dealt with in the will in the same way as those at Buxted Park of which he was only life tenant. The gift is to permit these chattels to go and be held with the respective mansion houses according to the limitations subsisting under his will or "otherwise howsoever," and the only difference between the two estates in this respect is that the limitations of St. Clare are contained in his will, while for those of Buxted Park it is necessary to look to his wife's will. There can indeed be no doubt, that Colonel Harcourt's will was made, in this respect, with direct reference to the limitations of Buxted Park contained in the will of Lady Catherine Harcourt, and that the bequests of the chattels must be construed accordingly. It follows that these bequests must be treated exactly in the same way as if the limitations of the realty to which the

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

bequests refer were all written out in Colonel Harcourt's will. The three classes of chattels are bequeathed in words which differ slightly. Warrington L.J., in his judgment in the Court of Appeal, described the variations, but, as they are evidently mere changes of phrase powerless to affect the construction, I merely take notice of the fact that they exist.

The general rules of construction in such a case as the present were stated by Wood V.-C. (afterwards Lord Hatherley) in *Lord Scarsdale* v. *Curzon* (1) in terms which, so far as I am aware, have not been corrected by any Court of superior authority, and with which I find myself in substantial agreement.

He said: "First. That an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth, and this whether the limitations of the personalty be expressed in extenso, or created by reference to the limitations of the realty; and that such reference may be effectually made either by expressly saying that the chattels are to go on the same uses as the realty, or by declaring that they are to be treated as heir-looms, this last expression being sufficient in itself to carry the property in the way I have stated.

"Secondly. This point was established, that the addition of the words 'so far as the rules of law or equity will permit,' and the circumstance that the legal interest is left in executors, will not prevail to alter the general rule or make the trusts executory. . . . .

"The third class of cases is, where the trusts are executory in the sense in which the word is now understood. . . . .

"The fourth rule is that which was established by *Foley* v. *Burnell* (2). . . . . The full extent of that authority is no more than this, that doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the

(1) 1 J. & H. 40, 50. (2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

interest until the time when possession of the realty is obtained."

Reference should be made to the statement of the rule by Parker J. (as he then was) in *In re Parker* (1), in which case the chattels were directed to be treated as heirlooms and to pass with the settled mansion house in the same manner as if they were land or other real property appendant or appurtenant thereto; they were accordingly to continue annexed to the mansion house so long as the law would permit, and be inherited, or enjoyed by, the several persons who should succeed to the mansion house. The learned judge, in holding that the chattels became vested absolutely in the tenant in tail in remainder after the life tenant, said: "It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his interest in the realty, and, if such estate is in remainder, subject to all prior limited estates such as interests for life. This rule . . . . does, in my opinion, give effect to the testator's expressed intention as nearly as the nature of the property admits, it being impossible wholly to effectuate such intention, because the law does not allow the creation of estates or heritable interests in personal property, and has rules against perpetuities. A settlor may, of course, use words shewing an intention to modify the rule, but the words relied on for this purpose must indicate such intention with reasonable certainty. . . . . It is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain."

These observations are emphasised by the fact that without a special context a phrase such as "estate tail in possession"

(1) [1910] 1 Ch. 581, 584.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

will be taken to mean a vested estate tail where the tenant in tail is not entitled to actual possession owing to the existence of a prior limited estate; in other words it will bear the meaning of a vested as opposed to a contingent interest: see *Martelli* v. *Holloway*. (1) It is noteworthy that in the present appeal the word "possession" is never used in connection with either the house or the estate in the bequests to be construed.

None of the cases on executory trusts is in point. Here the trusts are executed, as in *Christie* v. *Gosling* (2), where the gift of personalty was made with reference to the limitations of realty, and Lord Chelmsford said: "It is not contended that the trusts of the personal estate are executory; if they were, they could be moulded so as to carry out the intentions of the testator as far as the rules of law permit. But the bequest is a declaration, by the testator himself, of the trusts of the personal estate, and if he has expressed his intentions so as to offend against the law of perpetuity, the words 'as near thereto as the rules of law and equity will permit,' in his reference to the trusts of the real estate, will not assist him." There are similar words in the bequest now under consideration, but for the reason given, they cannot be used in support of the argument that they avail against the rule of perpetuity. The observation of Eve J. (3) is just: that "the only true test is to write out in extenso trusts of the personalty corresponding as near as may be to the limitations of the realty and then to determine as a matter of construction whether or no the rule against remoteness is infringed." This had already been said in effect by Wood V.-C. in *Lord Scarsdale* v. *Curzon* (4) and I am satisfied, after a close examination of the judgments in *Harrington* v. *Harrington* (5), in which *Christie* v. *Gosling* (2) was distinguished, that those judgments do not support the proposition that words such as "so far as the rules of law and equity will permit" can be used to correct a

(1) L. R. 5 H. L. 532.
(2) L. R. 1 H. L. 279, 290.
(3) [1921] 1 Ch. 187, 198.
(4) 1 J. & H. 40, 50.
(5) L. R. 5 H. L. 87.

gift which does infringe the rule against perpetuities, whatever weight they may have in cases where the construction is ambiguous.

It is necessary to examine one other case with care—namely, *In re Lord Chesham's Settlement.* (1) This was a decision of the Court of Appeal, which adopted a construction placed upon the same settlement by Chitty J. in 1886: *In re Lord Chesham* (2), and authoritative, therefore, for some twenty-three years. The material words of the instrument directed the trustees to hold the chattels then in question "upon trust to permit the same to be used held and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof." The eldest son, who was tenant in tail male, died after attaining the age of twenty-one, but in the lifetime of the tenant for life. It was held, both by Chitty J. in 1886 and by the Court of Appeal in 1909, that the second son on the death of the life tenant became entitled to the chattels as tenant in tail male in possession of the mansion house. It is clear from the judgments that the Court of Appeal was influenced by former decisions, though these were not binding upon them. The only question was whether the Court was satisfied that it was intended that no person should take unless he became tenant in tail in possession of the settled estate. The Court was so satisfied on the ground that the words "with the mansion house" were an essential part of the trust, and unless the tenant in tail were in actual possession the enjoyment of the chattels might be divorced from the enjoyment of the mansion house, whereas the chattels were only to be enjoyed with the house. I am satisfied that the Court considered that the trust was an application of the fourth rule in *Lord Scarsdale* v. *Curzon* (3) and that there is nothing in the decision which throws doubt upon the principles laid down in the earlier cases. The decision has been criticised and commented upon in *In re Beresford-Hope* (4); *In re*

(1) [1909] 2 Ch. 329.
(2) (1886) 31 Ch. D. 466.
(3) 1 J. & H. 40, 50.
(4) [1917] 1 Ch. 287.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

Fowler (1); and *In re Lewis* (2), and it may, without excessive irony, be said that it has been distinguished with more zest than it has been followed. I agree with Warrington L.J., that it is "very difficult to reconcile the decision with *Foley* v. *Burnell* (3)" and I find it proper to add that the force attributed to the verbs used, and in particular to the word "enjoyed," goes beyond the decision in any other case, whether earlier or later. The words used in the bequests of Colonel Harcourt, to which I now turn my attention, are, however, not such as render it necessary to consider whether in *In re Lord Chesham's Settlement* (4) was rightly decided or should be overruled; *In re Parker* (5) was nearer to *Chesham's Case* (4) than the present appeal, and there Parker J. distinguished it and in my opinion he was right in so doing. I do not myself regard *Chesham's Case* (4) as being more than a particular application of the principles governing this class of cases or as having laid down any principle or exception of general application.

The conclusion to be drawn from the principles laid down in the previous authorities as applied to the facts of this case is that there is no such indication of the testator's intention to exclude the first rule in *Lord Scarsdale* v. *Curzon* (6) as would justify a deviation from the general rule.

Subject, therefore, to a further question which still requires consideration, it would follow that the chattels in question are now vested in Viscount Portman for life and, subject thereto, belong to his daughter whose interest may, as we have seen, be divested by the birth of a son to her father.

It remains to consider whether this conclusion is defeated, not as a matter of construction, but by the operation of the shifting clause in the limitations of the Buxted Park Estate. This clause has already operated to carry the realty over to the appellants, but in its application to the personalty the rule against perpetuities assumes decisive importance. When we bear in mind that the material date is April 23, 1880, when

(1) [1917] 2 Ch. 307.
(2) [1918] 2 Ch. 308.
(3) 4 Bro. P. C. 319.
(4) [1909] 2 Ch. 329.
(5) [1910] 1 Ch. 581.
(6) 1 J. & H. 40.

by reason of the testator's death the will came into operation, and that the event is the succession by any son or remoter male issue of the wife of the second Viscount Portman to the title, it becomes too plain for argument that the clause infringes the rule, and so far as concerns the personalty is void. It has been argued on behalf of the appellants, however, that the clause must not be read in that way, but is in truth divisible, and therefore should be read as applying to each son of Lady Portman severally and individually. The consequence would be that as applied to the event, which has actually happened, of the present Viscount succeeding to the title the rule against perpetuities cannot be infringed and the clause would in any event enure to the benefit of the appellants. I am not sure that I have rightly understood the argument, but it seems to involve as a necessary consequence that a person having an estate in the mansion house has no right of property in the chattels, but a mere right to use them so long as he enjoys the mansion. It is true that Viscount Portman and his daughter have been divested of their estates in Buxted Park, but I have not been able to appreciate what the consequences of a sale of the property would be; to whom the ownership of the chattels would go; and in what manner. I am indeed unable to assent to the argument. In my opinion the clause is not so divisible. *Harrington* v. *Harrington* (1) at least, which was much relied upon, lends no support to the contention. The clauses there in question were not indeed shifting clauses at all. Lands had been settled on two persons successively for life with remainder in strict settlement. The first life tenant by his will gave certain chattels upon trust for the person or persons who for the time being, under the limitations in strict settlement above mentioned, should be in actual possession of a certain mansion house, which formed part of the lands so settled, to the end that these chattels might be deemed heirlooms to go, and for ever be used, with the same estates as far as the rules of law or equity would permit, but so nevertheless, that the chattels should not vest absolutely in any person seised under the settlement

(1) L. R. 5 H. L. 87.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Viscount Birkenhead L.C.

of the estates so settled for an estate of inheritance unless he should attain the age of twenty-one years or, dying under that age, should leave issue heritable under the limitations of the settlement. The first tenant in tail died under the age of twenty-one without issue and the chattels were claimed by his successor to the estates (himself an infant) and also by the residuary legatee. Malins V.-C. held that the chattels were divested by the death of the first tenant in tail and passed to his successor to the settled lands. His attention was not called to the residuary clause in the will. On appeal Lord Cairns L.C. held that the right of the first tenant in tail ceased on his death and that there were no words carrying over the chattels to any other person entitled to the settled estates but that they vested in the successor by virtue of the residuary clause in the will. Whichever view was right, the same person was entitled, and on the matter coming before the House of Lords no conclusion was reached as to which decision was right and the Order of the House expressly states that "it is unnecessary to decide under which title the plaintiff Charles Wyndham, the seventh Earl of Harrington, has become entitled to the heirlooms and funds in the decree mentioned." I do not read Lord Cairns' judgment (1) as expressing any opinion in favour of the divisibility of the clause before him; and still less as favouring the divisibility of a shifting clause such as that contained in Lady Catherine Harcourt's will. In effect, all he said was that even if the clause were split up such a severance would not assist the appellants' case. Nor do I think that Lord Westbury's judgment helps the appellants. He certainly uses language which, if correctly reported, is not easy (and perhaps is impossible) to reconcile with the principles governing the application of the rule against perpetuities; but so far as concerns the point, he says, in plain terms, that it is unnecessary to decide it as between the tenant in tail and the residuary legatee.

For these reasons I am of opinion that the order of the Court of Appeal was right and ought to be affirmed and I move your Lordships accordingly.

(1) L. R. 5 H. L. 106, 107.

LORD ATKINSON. My Lords, the facts have been already fully stated. I shall only restate such of them as is necessary to make what I am about to say intelligible.

Colonel Harcourt was the owner of a mansion house and estate in the Isle of Wight known as St. Clare. Lady Harcourt was entitled to a mansion house and estate known as Buxted Park in the county of Sussex, and, subject to the life interest of her husband if he should survive her (as in fact he did), she had a power to appoint this estate by will. Lady Harcourt's niece, Selina Charlotte, had married William Henry Portman, the eldest son of the second Lord Portman. Ten children were born of this marriage, the third son in order of priority being Henry Berkeley Portman, and the fourth son in the same order being Claud Berkeley Portman.

Lady Harcourt, in exercise of her power of appointment, appointed Buxted Park Estate to trustees upon trust to pay the rents and annual proceeds thereof to her niece Selina for her sole and separate use for her life, and after her death in trust for the first or only son of her said niece born in Lady Harcourt's lifetime who should not at the decease of his mother be entitled in possession or by remainder expectant upon the decease of the survivor of the then Lord Portman and William Henry Berkeley Portman to the family Barony of Portman during the life of such son, without impeachment of waste, and from and after his decease in trust for his first and every other son successively in tail with remainder to his first and every daughter in tail. Under these limitations on the death of Lady Harcourt's niece, who became Baroness Portman, that lady's third son, Henry Berkeley Portman, became entitled to an estate for life in Buxted Park. He had only one child, a daughter, Selina Lusia, born in September, 1903, who on her birth became tenant in tail of Buxted Park and estate subject to her father's life estate therein.

On October 16, 1919, this lady's father succeeded his own father, the second Lord Portman, to the title and became the third Lord Portman.

On this event the shifting clause contained in Lady Harcourt's will came into operation. It runs as follows:

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

"And I declare that if any *son or remoter male* issue of my said niece who by virtue of the limitations herein contained shall be or become entitled in possession to the said estate and hereditaments shall become entitled in possession to the said Barony then the trusts hereby declared for the benefit of the son or remoter issue becoming entitled in possession to the said Barony and of his issue male and female shall cease and determine as if he were dead without issue of his body and then and thenceforth the said hereditaments shall go and be in trust for such person or persons as by virtue of the limitations herein contained would then be entitled as the person or persons next in remainder to the same hereditaments in case such son or remoter issue so becoming entitled to the said Barony were then dead without issue of his body."

All the estate and interest of Henry Berkeley Portman and of his daughter Selina in the Buxted Park Estate passed away from them, and on October 16, 1919, became vested in Claud Berkeley Portman as tenant for life and subject thereto to Edward Claud Berkeley Portman, his eldest son, as tenant in tail. On January 17, 1920, the father and son united to bar this entail. It is not disputed, it could not be disputed, that the rule against perpetuities does not apply to gifts of estates in tail in realty, as the entail can always be barred and all conditions in defeasance of it thus destroyed. Neither is it disputed that the rule does apply to limitations of chattels, or that, if what purports to be an estate tail in chattels be simply granted to a donee, the donee becomes absolute owner, since an estate tail cannot be created in chattels.

The main question for consideration in this case is, however, what is the operation and effect of this shifting clause on the bequest contained in the will of Colonel Harcourt of certain chattels described as heirlooms contained in Buxted Park Mansion. He divides these chattels into three different classes, and grants them in words which, though differing somewhat inter se, are substantially to the same effect, so that the words of the third grant may be taken as a fair specimen of the others. It runs as follows: "And I give and bequeath all the household goods, furniture books pictures

and china which shall be in or about my said Mansion House called St. Clare and also in and about my said Mansion House called Buxted Park respectively at the time of my decease unto the said William Henry Berkeley Portman and Edward William Harcourt their executors and administrators in trust to permit the said household goods furniture books pictures and china respectively to go *and be held* as far as the rules of law and equity will permit with the said Mansion Houses called St. Clare and Buxted Park respectively, as heirlooms according to the limitations thereof respectively which shall respectively be subsisting under this my will or otherwise howsoever at the time of my decease and to be held *and enjoyed* accordingly in succession by the several person or persons who shall be respectively entitled for the time being to hold and enjoy the said Mansion Houses respectively."

The first thing to be observed about this disposition is that the heirlooms in the testator's own mansion house, St. Clare, are dealt with in precisely the same way as those in Buxted Park Mansion, in which he had under his wife's will only a life interest. The next is that in none of the gifts of the three classes of heirlooms is the word "possession," much less actual possession, used. The heirlooms "*are to go and be held*" with the mansion houses. They are to be *held and enjoyed* by those persons who for the time being are entitled to hold and enjoy the respective mansion houses; but though it is provided that the heirlooms are to go to and be held with the respective mansion houses, it is not expressly provided that they are to be held and enjoyed with the respective mansions, but merely that they are to go and be held as far as the rules of law and equity will permit according to the limitations of the mansion houses.

I quite concur with the Master of the Rolls in thinking that Colonel Harcourt must be taken to have known the contents of his wife's will. The fact that after her death he confirmed this will in three codicils, two dated in 1878 and one in 1880, in the first of which he refers to her death and makes an alteration in his will which appears to have been suggested by her death,

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

leads convincingly to that conclusion; while the contents of his own will go to show that the limitations in her will were to be taken into consideration with those in his own. I also concur with the Master of the Rolls in thinking that as far as the construction of Colonel Harcourt's will on this point is concerned it should be the same as if the shifting clause had been contained in his will. It must be so, I think, since he provides in his will that the heirlooms are to go and be held according to the limitations of the mansion houses respectively, whether subsisting under his will "or otherwise howsoever." It appears to me that it is impossible to hold that these latter words do not cover and include the limitations of those houses contained in Lady Harcourt's will. If that be so, I see nothing wrong in Eve J.'s suggestion that the true test to be applied to this bequest of the heirlooms is to write out in extenso the trusts of the personalty corresponding as near as may be to the limitations of the realty, and then determine whether or no the rule against remoteness is infringed, so that the effect would be the same as if the limitations of both the realty and the personalty were contained in the testator's will.

In *Lord Scarsdale* v. *Curzon* (1) Wood V.-C. (as Lord Hatherley then was), referring to *Foley* v. *Burnell* (2) and the cases which have followed it, says: "Upon this, the authorities have settled, that, where the trusts are executed (for there still seems to be a doubt remaining with reference to executory trusts), and where no restriction as to the attainment of the age of twenty-one, or the fulfilment of any condition, is introduced, the Court will deal with such limitations in this way: it will simply look to the limitations of the realty, and will vest the personalty according to those limitations—the consequence of which is, that, when you arrive at a person who is tenant in tail of the realty, you must give the personalty absolutely to him."

This is very much to the same effect as what Eve J. has said.

The Vice-Chancellor then proceeds to say: "The code of

(1) 1 J. & H. 40, 49, 50. (2) 4 Bro. P. C. 319.

law" (using Lord St. Leonards' words) "spoken of amounts to this, and nothing more: First. That an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth, and this whether the limitations of the personalty be expressed in extenso, or created by reference to the limitations of the realty; and that such reference may be effectually made either by expressly saying that the chattels are to go on the same uses as the realty, or by declaring that they are to be treated as heir-looms, this last expression being sufficient in itself to carry the property in the way I have stated. Secondly. This point was established, that the addition of the words 'so far as the rules of law or equity will permit,' and, the circumstance that the legal estate is left in executors, will not prevail to alter the general rule or make the trusts executory."

Many authorities have been cited as to the principle upon which gifts of heirlooms are to be construed. I do not think it necessary to refer to them in detail, as I think the result of them all is, as indeed one would have expected, quite accurately stated by Lord Parker (then Parker J.) in the case of *In re Parker*. (1) In that case it was by a codicil to the testator's will provided that the chattels to be considered as heirlooms "shall pass with my said house in the same manner as if they were land or other real property appendant or appurtenant thereto, and shall accordingly continue annexed to my said mansion house as long as the law will permit, and be inherited or enjoyed by the several persons who shall succeed to my said mansion house under or by virtue of the limitations in my said will and hereinbefore contained respecting the same, and be subject to the rules of law or equity applicable thereto, and in no wise pass under or by any bequest of my personal or residuary estate or effects."

These words tend much more strongly than do the words used in Colonel Harcourt's will to link together, as it were, the heirlooms and the mansion house which contained them,

(1) [1910] 1 Ch. 581.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

and treat both as forming one unit of property. Yet Lord Parker held that the tenant in tail of the mansion house became the absolute owner of the heirlooms, though he died in the lifetime of his father, the testator (who was tenant for life of the mansion), under age and unmarried.

In giving judgment Lord Parker said (1): "It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty, and, if such estate is in remainder, subject to all prior interests such as interests for life. . . . . A settlor may, of course, use words showing an intention to modify the rule, but the words relied on for this purpose must indicate such intention with reasonable certainty. Thus it is possible to introduce a provision defeating the interest of a tenant in tail by purchase who dies under the age of twenty-one years, but such a provision will not be implied merely by a direction that the real estate and chattels shall go together as long as the rules of law and equity permit. There must be an express provision to that effect. Similarly it is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain."

No provisions such as those mentioned by Lord Parker have been introduced in this case. The word "possession" has not been used. Even if it had been it might, on the authority of *Martelli* v. *Holloway* (2), be construed as referring to vested as opposed to contingent interests and not to actual possession.

Lord Parker referred in his judgment to *In re Lord Chesham's Settlement* (3), and expressed the opinion that there is nothing

(1) [1910] 1 Ch. 584. (2) L. R. 5 H. L. 532.
(3) [1909] 2 Ch. 329.

in that case to throw the least doubt upon the principles to be deduced from the earlier cases, or on the soundness of the decision arrived at in those cases. *In re Lord Chesham's Settlement* (1) was further criticised and distinguished in *In re Beresford-Hope* (2) and compared with all the preceding authorities and distinguished from them by Astbury J. in *In re Lewis*. (3) It has not been generally followed, though mentioned without disapproval by Peterson J. in *In re Fowler*. (4) I quite concur with Warrington L.J. in thinking that it is extremely difficult to reconcile it with *Foley* v. *Burnell* (5), and it appears to give a force and significance to the word "enjoyed" which that word has not received either in the cases which have preceded or followed it.

Apart, therefore, from the shifting clause, Selina Portman, the daughter of the present Lord Portman, in my opinion, became upon her birth in the year 1903 entitled to the absolute ownership of these heirlooms in Buxted Park Mansion, subject to her father's life estate therein, and also subject to the contingency of the birth of a brother to whom they would pass to her exclusion. The question for decision in the present case is: Does the shifting clause operate to destroy or cut down the interest either of herself or of her father? Now as to the shifting clause itself, it is clear that the time from which the rule of perpetuities would run would be the death of Colonel Harcourt on April 23, 1880, and the lives referred to in that rule must be the lives of persons named or indicated by the testator or donor. The clause provides that if a son or remoter male issue of Lady Portman should become entitled to the barony, the estates are to shift. Lady Portman survived the testator. She did not die till January 4, 1899, and the words "remoter issue" would, of course, include a son born after the death of the testator who might succeed to the title more than seventy-one years after the determination of lives in being at the date of his death.

The shifting clause, therefore, would infringe against the

(1) [1909] 2 Ch. 329.
(2) [1917] 1 Ch. 287.
(3) [1918] 2 Ch. 308.
(4) [1917] 2 Ch. 307.
(5) 4 Bro. P. C. 319.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

rule of perpetuities, inasmuch as the event, on the occurrence of which it operated, might happen beyond the prescribed limit. If the matter rested there, I should be clearly of opinion that the shifting clause was as regards the limitation of the heirlooms entirely void and of none effect, with the result that Selina Portman would be possessed of the absolute interest in them, subject to the life estate of her father.

It was contended, however, by Mr. Maugham on behalf of the appellants that the shifting clause in Lady Harcourt's will was divisible and should be read as applying to each of Lady Portman's sons severally and individually. That, as I understood him, the words in the trust of the heirlooms contained in Colonel Harcourt's will "according to the limitations thereof" are to be ignored or no effect be given to them, and that the following words also occurring there, "to be held and enjoyed accordingly in succession by the several person or persons who shall be respectively entitled for the time being to hold and enjoy the said Mansion Houses" are to be construed with the shifting clause as not conferring either an absolute estate for life or in tail on any one, but merely a right to the donees or cestuis que trust of the respective mansion houses for the time being to enjoy those heirlooms while and as long as they respectively enjoyed the mansion houses, with the result that, as under the shifting clause Lord Portman has been deprived of the right to reside in or enjoy Buxted Park Mansion, and as his daughter cannot succeed to such a right, both have ceased to have any estate or interest in or right to the use and enjoyment of these heirlooms, and that this right has passed to Claude Berkeley Portman, one of the appellants, to which right his son, the other appellant, may possibly succeed.

I am most anxious not to do Mr. Maugham's argument an injustice, but it would appear to me rather to imply that no estate or interest in the heirlooms vested in a tenant for life or in tail of Buxted Park and mansion house, but merely a right to the use of them. In addition the appellants have barred the estate tail, and are between them owners in fee of the estate and mansion house. They can sell it. I did not

gather from him whether the purchaser succeeding to the occupation and enjoyment of the mansion house would be entitled to the use and enjoyment of all heirlooms while he occupied that house, and no longer, or whether he would be entitled to some estate or interest in them, and, if so, what was the nature, quality or extent of that estate or interest.

The authority upon which the contention that the shifting clause was thus divisible, applying to each son severally and individually, was based upon the case of *Harrington* v. *Harrington*. (1) It is obvious that the case of *Miles* v. *Harford* (2) has no application to this case, as in that case the trust was executory not executed as here.

Now the relevant facts of the case of *Harrington* v. *Harrington* (1) are as follows. By a settlement dated July 20, 1804, certain hereditaments were limited to the third Earl of Harrington for life, with remainder as to some of these hereditaments to a relative, afterwards fourth Earl of Harrington, for life, with remainder as to the remaining portion of these hereditaments to the same person for life with remainder as to both the said hereditaments in strict settlement. The third Earl made a will, whereby he gave certain chattels to trustees in trust for the person or persons who for the time being should under the limitations in strict settlement be in actual possession of the mansion house of Elvaston (a portion of the hereditament limited in strict settlement), to the end that these chattels might be deemed heirlooms to go and for ever be used with the same estates (as far as the rules of law or equity would permit), but so nevertheless, that the said chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seised of the estates put in strict settlement for an estate of inheritance, unless such person should attain the age of twenty-one years or, dying under that age, should leave issue inheritable under the limitations of the settlement. The first tenant in tail in possession under the limitations of the settlement, the sixth Earl, died under twenty-one years of

(1) (1868) L. R. 3 Ch. 564; L. R. 5 H. L. 87.
(2) (1879) 12 Ch. D. 691.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

age without issue. The mother of this sixth Earl claimed the heirlooms on the ground that they had become the property of her son. The seventh Earl, the successor to the sixth, and also the residuary legatee of the third Earl under his aforesaid will, also claimed the heirlooms. Malins V.-C. held that these chattels, after being enjoyed by the sixth Earl during his minority, were divested on his death under twenty-one and went over and vested absolutely in the seventh Earl. On an appeal from this decision which came before Lord Cairns L.C. it was held that the estate of the sixth Earl terminated by his death under twenty-one without issue, but that there were no words which carried over the chattels in that event to any other tenant for life or tenant in tail, and that they passed by the residuary clause in the will to the seventh Earl. Thus, whether the Vice-Chancellor was right or wrong, or the Lord Chancellor was right or wrong, the seventh Earl became the owner of the heirlooms; according to the first, because they passed to him as tenant in tail, and according to the second, because they passed to him as residuary legatee of the third Earl. As far as decision goes the case was left by the House of Lords very much in the position in which it stood before it came before them. The House did not decide whether the Vice-Chancellor or the Lord Chancellor was right. That appears from the Order of the House as entered in the Journals, which runs thus :—

"It is ordered and adjudged by the Lords spiritual and temporal in Parliament assembled that the appeal be . . . . dismissed from this House; And it appearing to this House that in the events which have happened and having regard to the title of the Plaintiff, Charles Wyndham seventh Earl of Harrington, as tenant in tail male to the actual possession of the mansion-house, and estate at Elvaston, in the county of Derby, settled by indenture of the 20th July, 1804, and also as absolutely entitled to the residuary estate of Charles third Earl of Harrington, it is unnecessary to decide under which title the Plaintiff Charles Wyndham seventh Earl of Harrington has become entitled to the heirlooms and funds in the decree mentioned."

There is therefore no decision binding on this House as to the proper construction on this question of heirlooms of the provisions of a will such as that of the third Earl of Harrington taken in connection with the limitations contained in the settlement of July 20, 1804. In addition it is obvious that the clause in question in *Harrington* v. *Harrington* (1) was not a shifting clause at all, divesting a previously vested interest or imposing conditions upon the vesting, and even if it was capable of being applicable separately to each interest affected, it would furnish no reason for reading similarly a divesting clause such as that contained in Lady Harcourt's will. Lord Hatherley dwells upon this distinction. He says (1): "It was not annexed by way of proviso cutting down the gift, but was an essential part of the gift itself, so that no person could claim the gift except as a gift to him in the event of his being the person who ultimately could claim to hold the gift by fulfilling all the qualifications to which the gift itself was attached. I apprehend, therefore, that a person who took the estate, and did not attain the age of twenty-one, had not fulfilled the conditions of the gift, and cannot claim in any way to retain the gift; nor can any persons who derive their title through him make out any claim to that gift, as being a gift absolutely vested in him, subject only to be defeated by the proviso."

It was upon the judgment of Lord Westbury in this case that Mr. Maugham chiefly relied. I presume we must take it that the noble Lord is correctly reported. I confess I am unable to form any clear conception of what he meant by the following passage. After referring to the practice which has grown up of annexing a condition that the heirlooms shall not vest absolutely in any tenant in tail unless such tenant in tail shall attain twenty-one years of age, or, dying under that age, shall leave issue inheritable under the settlement, he says (2): "The event of the death of the infant in tail has happened within the period of time allowed by the rule against perpetuities, and therefore the direction that the heir-looms shall accompany the settled

(1) L. R. 5 H. L. 99. (2) L. R. 5 H. L. 102.

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Atkinson.

estates remains pro tanto unexhausted and in full force; and this direction takes up the chattels as soon as they are divested of the ownership of the infant tenant in tail, and carries them on to the next tenant under the limitations of the settled estates."

Of course it is impossible to suppose that Lord Westbury was not well aware that the validity of a clause depends under the rule against perpetuities on the reach of the clause, the events which may come within the limit allowed, not in any given case on the events which in fact have happened within that limit. At all events he appears to say that as to this point, with which he deals later on, it is not necessary to decide it as between the tenant in tail and the residuary legatee.

I concur with the Master of the Rolls in thinking that in *Harrington* v. *Harrington* (1) Lord Cairns did not express any opinion in favour of the divisibility of such a clause as the shifting clause in the present case. All he did was to point out that if the clause he was considering was split up, it would in that case not help the appellants. It is not legitimate to put a strained and unnatural meaning on words to escape the rule against perpetuities: *Pearks* v. *Moseley*. (2)

In my opinion, therefore, the appellants' contention on this point cannot be sustained.

The appeal, I think, fails, and should be dismissed with costs.

LORD SUMNER. My Lords, I concur.

LORD WRENBURY. My Lords, having regard to the judgments delivered by your Lordships who have preceded me, I need do no more than state quite briefly the reasoning that leads me to the same conclusion.

On September 11, 1903, Selina Lusia Portman was born. I look to Colonel Harcourt's will to see who were the person or persons who at that moment were entitled to the heirlooms. I find that they are, "so far as the rules of law and equity will permit," the persons who according to the limitations

(1) L. R. 3 Ch. 564. (2) 5 App. Cas. 714, 719.

in the will of Lady Catherine Harcourt are entitled to hold and enjoy in succession Buxted Park. I note that they are the persons "entitled," that the matter is one of title not one of right of possession or of occupation. There is only one gift in Colonel Harcourt's will, and that is the gift by reference. The word "accordingly," in the concluding words "to be held and enjoyed accordingly in succession," etc., sends the reader back to the preceding words, and those are words of gift, "to go and be held so far as the rules of law and equity will permit" with the mansion house "as heirlooms according to the limitations" in Lady Catherine Harcourt's will. Looking then to the will of Lady Catherine Harcourt I find that the persons entitled at this date to Buxted Park were in succession Henry Berkeley Portman for life and his newly born daughter Selina Lusia Portman in tail, the estate of the latter being liable to be divested by the birth of a son to Henry Berkeley Portman, who if born would take the estate tail in lieu of Selina Lusia. An estate tail in personalty is unknown to the law. Accordingly the heirlooms being personalty were under Colonel Harcourt's will settled at this date for Henry Berkeley Portman for life, and after his death for Selina Lusia Portman absolutely with a gift over to a son absolutely if a son should be born. So matters remained for sixteen years. Henry Berkeley Portman held and enjoyed Buxted Park and the heirlooms with it.

In October, 1919, occurred an event upon which all the questions in this case turn. The second baron died, Henry Berkeley Portman became third baron, and the shifting clause in Lady Catherine Harcourt's will took effect. Buxted Park passed under the limitations of her will to the appellant Claud Berkeley Portman for life and his son in tail. On January 17, 1920, they barred the entail. Who are now entitled to the heirlooms? That is the question in this case.

The event upon which the shifting clause in Lady Catherine Harcourt's will was to take effect was one which might not occur within the time allowed by the law against perpetuities. As regards the real estate with which she was dealing this consideration was not material, for a shifting clause after an

H. L. (E.) 1922 PORTMAN v. VISCOUNT PORTMAN. Lord Wrenbury.

estate tail is never too remote, for the estate tail can be barred, and, if so, the shifting clause falls with it. But the same is not true with regard to personal estate. When first a person becomes entitled to such an estate as if the property were realty would be a vested estate of inheritance, whether in possession or remainder, that person becomes absolutely entitled to the personalty subject to any prior limited interest. Selina Lusia was such a person. Why was not she at birth absolutely entitled to the heirlooms subject to her father's life interest and subject to the gift over in favour of a son in case a son should be born to her father? The appellants argue that the law as to perpetuities is not infringed by a direction that within the time allowed by that law you are to look for the persons entitled to the real estate. But this is to overlook the fact that if at the time at which you obey that direction within the time allowed you come upon a person who if the property were realty would be tenant in tail, such a person is absolutely entitled to the chattels, and if his estate is only to be divested by the operation of a clause which, as regards personalty, is bad, because it may infringe (notwithstanding that in the particular case it has not infringed) the law as to perpetuities, that clause must be disregarded. In the case of realty the shifting clause is good, because it will always fall to the ground if the estate tail is barred. In the case of personalty it is bad, because after a tenant in tail has by reason of his estate become absolutely entitled it may (not that it will) operate beyond a life or lives in being and twenty-one years after.

For these reasons I think this appeal fails.

LORD BUCKMASTER (read by LORD SUMNER). My Lords, it is not without hesitation that I have come to the conclusion that this appeal must fail.

I think Mr. Maugham correctly stated the real difficulty when he said that it lay in determining whether the limitations of Lady Harcourt's will of the Buxted Park Estate must be regarded as incorporated literally and verbally in the will of Colonel Harcourt by which he disposed of the chattels, for if

Colonel Harcourt's will can be regarded as containing dispositions which would be operative entirely independent of the limitations of Buxted Park, then the fact that in those limitations there are provisions obnoxious to the rule against perpetuities would not affect the case.

Now the gift itself, in its earlier words, has no efficacy apart from the limitations of Buxted Park, for it is a gift to permit the chattels to go according to such limitations.

It concludes, however, by a statement that the chattels are to be held and enjoyed by the persons who shall be respectively entitled to hold and enjoy accordingly the mansion house. In my opinion, these words are nothing but the explanation of what he intends to be the effect of the former gift, and do not create a gift which can operate alone. Unless, therefore, the limitations of the Buxted Park Estate are introduced into the will, it is, in my opinion, an inoperative document, but if they be introduced, I can see no sound argument against the respondents' claim. For these limitations contain a shifting clause operating for all time during the existence of the estate claimed, and therefore as regards the personal chattels the clause is void as offending the rule against perpetuities. The argument that it might be regarded as imposing conditions which were good within the limits, appears to me to result in the conclusion that a clause which is upon the face of it void, because of the too extensive period of its duration, can be cut down so as to be good within the proper limits, and this is contrary to the well settled principles applicable to such a case. It is of course true that the first tenant in tail of chattels settled by relation to the limitations of realty, does not become the absolute owner if the estate is defeated by conditions inherent in the gift; but this depends upon the fact that the gift is in itself conditional and does not enable chattels to be shifted from person to person within a limit artificially constructed by treating the shifting clause in the limitations of the real estate as a series of independent conditions affecting the gift. This distinction is illustrated by the case of *Harrington* v. *Harrington* (1), where the decision really depended

(1) L. R. 5 H. L. 87.

H. L. (E.) 1922

PORTMAN v. VISCOUNT PORTMAN.

Lord Buckmaster.

upon the conclusion that according to the true construction of the documents, it was not a case of an estate in tail male subject to a shifting clause, but that there was no gift unless each successive earl attained the age of twenty-one years and this condition was imposed on the gift of the chattels by the will which contained the gift.

Those are not the circumstances in the present case, and, for the reasons which I have given, I think that this appeal must fail.

The result is a strange comment on the vanity of human wishes, for the absolute ownership of these heirlooms will now vest in a lady who can never become entitled to the estate which the testator desired to enrich. This is, however, due to the operation of the law which, in spite of the opinion of Lord Westbury, is not open to dispute.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1922.

Solicitors for the appellants : *Greenfield & Cracknall.*
Solicitors for the respondents : *Rawle, Johnstone & Co.*

[HOUSE OF LORDS.]

SPENCER . . . . . APPELLANT;

AND

HEMMERDE . . . . . RESPONDENT.

H. L. (E.)*
1922
July 28.

Limitations, Statutes of—Debt—Acknowledgment — Sufficiency —Limitation Act, 1623 (21 *Jac.* 1, *c.* 16)—*Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14).

In 1915 a debtor, upon being pressed for payment of a loan granted to him in 1910 and interest thereon, wrote to the lender, in explanation of a former letter, "It is not that I won't pay you, but that I can't do so. . . . . What I wrote was not that I saw no prospect at present of being able to repay the capital, but that I saw no prospect of being able to repay the capital at present." The debtor never paid any part of the principal or interest.

In answer to an action brought against him in 1920 for payment of the debt the debtor pleaded the Statute of Limitations:—

Held, that the letter was a sufficient acknowledgment to take the case out of the statute.

Cooper v. *Kendall* [1909] 1 K. B. 405 approved.

Fettes v. *Robertson* (1921) 37 Times L. R. 581 considered.

The authorities on the doctrine of acknowledgment reviewed by Lord Sumner.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Bailhache J.

The following statement of facts is taken from the opinion of Viscount Cave:—

"In the year 1910 Mr. Joseph Benson (through whom the appellant claims) lent to the respondent, Mr. Hemmerde, a sum of 1000*l.*; and in a letter acknowledging the loan which was dated the 2nd of March, 1910, the respondent undertook to repay it in two months and to pay interest at 7 per cent. per annum, and added: 'It is extremely kind of you to assist me at this juncture by a transaction which is quite outside the ordinary rules of business security, and which I recognize to be merely a generous and timely effort to help me over a very unpleasant financial crisis.'

Certain securities were deposited with Mr. Benson as

* *Present:* VISCOUNT CAVE, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

H. L. (E.) 1922 SPENCER v. HEMMERDE.

security for the loan, but these were subsequently given up at the respondent's request. No part of the principal or interest was in fact paid. Mr. Benson, to whom this advance appears to have caused some financial embarrassment, from time to time pressed for payment; and ultimately on the 4th November, 1915, he wrote to the respondent a letter in which he made formal application for payment of the 1000*l.* and interest and stated that he would not stay his hand any further and the matter would have to be settled without further delay. The writer added: 'I confess I am greatly surprised that you have treated the matter so coolly, no letter or personal word. You will remember your coming to me in your time of great need, and at great personal inconvenience I helped you because I believed you would honourably fulfil your promise and repay me on an early date.'

In answer to this urgent application the respondent wrote to Mr. Benson a letter dated the 4th November in the following terms: 'I think it is a pity you write me in such a tone. Have you the slightest idea what these times mean to professional men? I have not been to see you because I had absolutely nothing to tell you but what you must know already. I will look in and see you some day next week, but I cannot at present hold out the slightest hope of paying you the capital. I will tell you exactly how things stand when I see you.'

This did not satisfy Mr. Benson, who on the 5th November wrote a further letter stating that a call would be useless and that unless he had some definite proposal from the respondent he should ask his solicitor to take the matter in hand and to act promptly. The respondent thereupon wrote the following letter, upon which this case appears to me to turn:—

'1, Hare Court,
'Temple, E.C.,
'November 7th.

'MY DEAR MR. BENSON,

'IT is not that I won't pay you, but that I can't do so. It is important that I should see you and explain the situation,

and I shall therefore ring you up to-morrow to make an appointment.

'What I wrote was not that I saw no prospect at present of being able to repay the capital, but that I saw no prospect of being able to repay the capital at present. The condition of things at the Bar is such that the vast majority of us will be getting into debt rather than out of it.

'I have a good deal to talk to you about, and nothing can be gained by flying to solicitors.

'Yours truly,

'EDWARD G. HEMMERDE.'

Mr. Benson accordingly stayed his hand, and it was not until the 22nd June, 1920, that the appellant (the trustee under a deed of arrangement with creditors executed by Mr. Benson) issued his writ in this action, claiming payment of the principal and interest. The respondent pleaded the Statute of Limitations (21 Jac. 1, c. 16); and the appellant in his reply relied on the above-mentioned two letters of the 4th and 7th November, 1915, and on other letters which are not now material, as containing a sufficient acknowledgment to take the case out of the statute. Bailhache J. held the letters to be sufficient for that purpose, and gave judgment for the appellant; but on appeal the Court of Appeal (Bankes and Atkin L.JJ.; Scrutton L.J. dissenting), purporting to follow their previous decision in *Fettes* v. *Robertson* (1), reversed his decision and dismissed the action. Hence the present appeal."

1922. June 13, 15. *Schiller K.C.* (with him *R. Harker*) for the appellant. All the judges in the Courts below were agreed that there was here a plain acknowledgment of indebtedness, but they were equally divided as to the effect of that acknowledgment. The principles to be deduced from the authorities may be thus stated. Where there is an acknowledgment simpliciter the Court will infer from that acknowledgment a general promise to pay, which may mean a promise to pay forthwith or a promise to pay within a

(1) 37 Times L. R. 581.

H. L. (E.) 1922 SPENCER v. HEMMERDE.

reasonable time. Similarly a promise to pay simpliciter is sufficient to take the case out of the statute. Where the acknowledgment is accompanied by a statement which is inconsistent with the implication of a general promise to pay, as, for example, where the debtor says, "I owe you the money, but I refuse to pay or I will pay you only on certain conditions," that negatives the general implication arising from the acknowledgment. But where there is an unconditional acknowledgment coupled with a statement of inability to pay and of a hope to pay in future that is not sufficient to rebut the implication: *Tanner* v. *Smart* (1); *Chasemore* v. *Turner* (2); *In re River Steamer Co. Mitchell's Claim* (3); *Green* v. *Humphreys* (4); *Lee* v. *Wilmot* (5); Lord Halsbury's Laws of England, vol. xix., pp. 58, 63, 65. The letters of November 4 and 7 meant to convey the impression that the debtor was intending to pay, but was asking for an indulgence, and by means of those letters he obtained the indulgence which enabled him to set up the statute. The result of the authorities is that a mere request for indulgence is not sufficient to negative the promise implied from the acknowledgment. Where the debtor says, "I owe you the debt, but I cannot pay you at present," that is neither a refusal to pay nor a conditional promise. The majority of the Court of Appeal considered that they were bound by their recent decision in *Fettes* v. *Robertson* (6), which was decided shortly after Bailhache J.'s decision in the present case. That decision proceeded on the interpretation of the particular letters then under consideration, but, if necessary, it is submitted that it was a wrong application of the principles established by the authorities, and, in particular, is inconsistent with the decision of the same Court in *Cooper* v. *Kendall.* (7)

Merriman K. C. and *Sir Albion Richardson* for the respondent. It is not disputed that there was here an acknowledgment

(1) (1827) 6 B. & C. 603, 609.
(2) (1875) L. R. 10 Q. B. 500, 508, 510.
(3) (1871) L. R. 6 Ch. 822, 828.
(4) (1884) 26 Ch. D. 474, 479.
(5) (1866) L. R. 1 Ex. 364, 367.
(6) 37 Times L. R. 581.
(7) [1909] 1 K. B. 405.

of the debt, but that is not sufficient. Under Lord Tenterden's Act there must be an acknowledgment from which a promise to pay can be inferred, and the same principle prevailed before the passing of that Act, which in no way altered the law except by requiring that the acknowledgment or promise should be in writing. An acknowledgment which does not support a promise is not an answer to the statute. The promise which has to be implied is a promise to pay on request, and a promise to pay on request will not be implied from an acknowledgment which is coupled with a statement of inability to pay : *Tanner* v. *Smart* (1) ; *Smith* v. *Thorne* (2) ; *Hammond* v. *Smith* (3) ; *Philips* v. *Philips* (4) ; *Hart* v. *Prendergast.* (5) *Chasemore* v. *Turner* (6) dealt with quite a different class of case. Here, at the most, there is a promise by the debtor to pay if and when he can. It is said that from that you infer an acknowledgment from which a general promise to pay is to be implied, and that you must then see whether you can find anything to rebut that implication. That argument was refuted by Atkin L.J. in *Fettes* v. *Robertson.* (7) The true way to deal with the case is to look at the writing as a whole and see whether it imports a promise to pay. In the respondent's submission the words "I would pay if I could" are inconsistent with a promise to pay on request. *Fettes* v. *Robertson* (7) cannot be overruled without also overruling *Tanner* v. *Smart.* (1)

[They also referred to *Morgan* v. *Rowlands.* (8)]

Schiller K.C. replied.

The House took time for consideration.

1922. July 28. VISCOUNT CAVE (read by LORD CARSON) stated the facts and continued : My Lords, the law relating to matters of this kind is not in doubt. The statute (21 Jac. I, c. 16, s. 3) enacted that " . . . . all actions of debt grounded upon any lending or contract without specialty . . . . shall

(1) 6 B. & C. 603, 609, 610.
(2) (1852) 18 Q. B. 134, 143.
(3) (1864) 33 Beav. 452.
(4) (1844) 3 Hare, 281, 299.
(5) (1845) 14 M. & W. 741, 743.
(6) L. R. 10 Q. B. 500.
(7) 37 Times L. R. 581.
(8) (1872) L. R. 7 Q. B. 493, 497.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Viscount Cave.

be commenced and sued . . . . within six years next after the cause of such actions . . . . and not after," and made no reference to any acknowledgment; but it was held in a series of cases that a promise by the debtor to pay the debt, if given within six years before action brought, was sufficient to create a new contract and so to take the case out of the operation of the statute, the existing debt being a sufficient consideration to support the promise. It was also held that a simple acknowledgment of the debt, without any express promise, was sufficient for the purpose, an acknowledgment implying a promise to pay. Some of the earlier cases went so far as to decide that an acknowledgment was sufficient, though coupled with a promise to pay at some future time which had not arrived or upon some condition that had not been performed, or even with an absolute refusal to pay; but this was set right by the decision of the Court of King's Bench in *Tanner* v. *Smart* (1), where Lord Tenterden, in giving the judgment of the Court, said: "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?"

No doubt the doctrine so established was originally judge-made law; but it has stood unchallenged for nearly a century, and indeed it has received statutory recognition. For the statute commonly called Lord Tenterden's Act (9 Geo. 4, c. 14), after referring to the Statutes of Limitation, provides that: "In actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party

(1) 6 B. & C. 603, 609.

chargeable thereby." This enactment refers to an "acknowledgment or promise" as if either would be sufficient to take a case out of the statute. But the words of the Act are negative only, and I think it clear that the acknowledgment there referred to must be an acknowledgment which but for this Act would have been sufficient to take the case out of the statute of James, that is to say, an acknowledgment implying a promise to pay; and it has always been so held.

Since the case of *Tanner* v. *Smart* (1) the law as there laid down has been uniformly accepted, and it must be held to be settled law (1.) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James I.; (2.) that such a promise is implied in a simple acknowledgment of the debt; but (3.) that where an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay. The decisions upon the Act are very numerous; but in every one of them the law has been assumed to be as above stated and the decision has turned upon the meaning of the particular words used in the case. It is therefore unnecessary to refer to the authorities in detail; but some statements of the principle by distinguished judges may, I think, be usefully quoted.

The following summary of the law by Wigram V.-C. in *Philips* v. *Philips* (2) has been accepted in many subsequent cases at common law: "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old

(1) 6 B. & C. 603.

(2) 3 Hare, 281, 299.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Viscount Cave.

debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

In *Smith* v. *Thorne* (1) Parke B. said: "There has been no question, since *Tanner* v. *Smart* (2), that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By statute 9 Geo. 4, c. 14, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by shewing, on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified. No doubt a mere acknowledgment of the existence of the debt (as, for instance, an I.O.U.), if unaccompanied by any expressions which control its effect, is sufficient to support an unconditional promise to pay."

In *Lee* v. *Wilmot* (3) Channell B., with whom Bramwell B. agreed, said: "I agree, that, to take a case out of the statute, there must be a promise or acknowledgment in writing, and I doubt whether the Act meant two different things when it said 'promise or acknowledgment.' If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference." In the same case Martin B. quoted with approval the following statement of the law from a note in Williams' Saunders: "that an acknowledgment operates only as evidence of a promise to pay; and accordingly, that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied."

(1) 18 Q. B. 134, 143. (2) 6 B. & C. 603. (3) L. R. 1 Ex. 364, 367.

In *Chasemore* v. *Turner* (1) Amphlett B. formulated the rule as follows: "The principle I take to be this: First of all, if there be an absolute unconditional acknowledgment of the debt, that is sufficient. If that stands alone, and nothing is said about payment, the acknowledgment of the debt would imply a promise in law to pay the debt. But if there is not only an acknowledgment of the debt, but a promise to pay the debt in words, we then have to look whether the promise to pay is an unqualified unconditional promise, or whether it is a conditional promise; and if it is a conditional promise to pay, and the condition is not performed, then the mere acknowledgment of the debt will not take the case out of the statute."

Lastly, in *Green* v. *Humphreys* (2), Bowen L.J. said: "I regret that we have to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the Court applies the principle. It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment a promise to pay will be inferred. That was laid down by Lord Tenterden in *Tanner* v. *Smart* (3), and the proposition, as Chief Baron Kelly said in *Quincey* v. *Sharpe* (4), has never been disputed, and it has been restated over and over again in all the Courts. Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words

(1) L. R. 10 Q. B. 500, 506.
(2) 26 Ch. D. 474, 479.
(3) 6 B. & C. 603, 606.
(4) (1876) 1 Ex. D. 72.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Viscount Cave.

something that expresses less than a promise to pay (which, as Lord Bramwell pointed out in *Lee* v. *Wilmot* (1), will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater."

This being the law, I turn to the letters written in this case with a view to determining whether, according to the fair and natural meaning of those letters, they contain either an express promise to pay or a clear acknowledgment of the debt, and in the latter case whether the acknowledgment is coupled with words which prevent the implication of an unconditional promise. The respondent's letter of November 4 contains neither promise nor clear acknowledgment; and its principal value to the appellant is that it serves to connect the later letters with Mr. Benson's letter of November 4, and so to identify the debt referred to in those letters as being the principal and interest, payment of which was required by Mr. Benson's letter of November 4. It is on the interpretation of the respondent's letter of November 7 that the decision must turn.

What, then, does that letter mean? And, first, does it contain an acknowledgment of the debt? I think it does. The expression, "It is not that I won't pay you," appears to me to mean that the writer does not refuse to pay his debt, but on the contrary admits the debt and holds himself bound to pay it; and this interpretation is supported by the subsequent repudiation of any suggestion that he had professed to see no prospect of paying the capital, and by the reference to getting out of debt. The words may not amount to an express promise to pay the principal and interest due, but at least they contain an admission of liability and a profession of the writer's willingness to discharge it, which, unless qualified by other expressions in the letters, carries with it a promise to pay.

Then, are the words, "I can't do so," and the statement that the writer sees no prospect of being able to pay the capital at present, so inconsistent with a promise to pay that

(1) L. R. 1 Ex. 364, 367.

they negative the implication of such a promise? I do not think they are. There is no promise to pay on a future date, or on the fulfilment of a condition, and still less is there a refusal to pay at all. There is only a profession of present inability to carry out the promise which is implied. It is urged that, when a man couples his acknowledgment of a debt with a statement that he cannot pay, it is difficult to read into his acknowledgment a promise that he will pay; and no doubt there is force in this observation, which appears to have commended itself to the Court of Appeal, both in this case and in the case of *Fettes* v. *Robertson*. (1) But it does not appear to me that the two things are really inconsistent. A debtor may well say at one and the same time: "I admit my obligation and promise to discharge it," and "I do not discharge it now, because I have not the money to do so." The important thing is that the present obligation to pay is admitted and the original promise to pay is renewed and affirmed without condition or qualification; and if that be done, there is a new promise to pay upon which an action may be founded. I do not doubt that in the present case the respondent intended his letter to be read in this sense, nor that Mr. Benson so understood it and upon the faith of the letter, so understood, delayed his proceedings; and if so, the respondent must be held to his promise. In my opinion there is a sufficient acknowledgment to prevent the statute from having effect.

My Lords, I have thought it right to deal with the letters relied upon according to their terms, and without reference to the countless decisions upon the meaning of other documents couched in different terms. But I cannot refrain from adding that my conclusion is in accordance with the opinion expressed by Cotton L.J. in *Green* v. *Humphreys* (2) that "if he" (the defendant) "had referred in terms to 'my debt which I am sorry I cannot at present pay,' probably the words would have been sufficient to constitute an express acknowledgment"; and is directly supported by the decision of the Court of Appeal itself in *Cooper* v. *Kendall*. (3)

(1) 37 Times L. R. 581. (2) 26 Ch. D. 474, 479. (3) [1909] 1 K. B. 405.

H. L. (E.) 1922 SPENCER v. HEMMERDE.

Upon the whole I think that the appeal should be allowed and that the judgment of Bailhache J. should be restored with costs here and below, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, the facts of this case have been fully stated. The principles applicable to cases such as this are well established. The difficulty arising in any particular case consists in the difficulty of applying those principles to the particular facts of the particular case. In the present case, it is to be borne in mind that the respondent's letters of November 4 and 7 are written in reply to two letters of the creditor threatening, in effect, to institute proceedings against the debtor to recover a sum of 1000*l.* principal and 7 per cent. interest. In the second of these letters, dated November 5, 1915, the creditor threatens to instruct his solicitors to take the matter in hand and act promptly on November 11, six days later, unless he receives from the debtor some definite proposal. There is not a single expression in either of the respondent's letters repudiating the obligation to pay this debt which the creditor so threatens to enforce. On the contrary, the debtor's language appears to me to amount to an admission that the obligation upon him to pay it exists. There is nothing to be found in the respondent's letters amounting either to a repudiation of this obligation or to a statement that he will never discharge it. On the contrary, the letters imply a willingness to discharge it at once if he possessed the means of doing so: "His poverty but not his will consents" to the delay. He only says that he has no prospect of being able to pay the capital at present. There is no express promise contained in these letters to pay the debt, but in my view there is nothing in them to rebut the presumption of a promise to pay it which the law implies from an acknowledgment such as these letters contain that the debt is due. This implied promise is not conditioned or narrowed by anything contained in the letters. It remains existing and operative, though the debtor says for the present he cannot perform it. He does not suggest

he will not perform it, or may not be able to perform it at some future time. He wants forbearance, wants further time to discharge the obligation which he impliedly admits rests upon him, that is all.

In my view, the cases of *Chasemore* v. *Turner* (1), *Sidwell* v. *Mason* (2), especially Bramwell B.'s observation at p. 310, *Cooper* v. *Kendall* (3), establish that an acknowledgment such as is contained in these letters, even though coupled with a statement of an inability to pay at the time of writing, is enough to prevent the operation of the statute. There is nothing in the case of *Fettes* v. *Robertson* (4) inconsistent with these decisions.

In my opinion, therefore, the appeal succeeds. The decision of the Court of Appeal was, I think, erroneous, and should be reversed. The decision of Bailhache J. was right and should be restored, and the appeal be allowed with costs here and in the Court of Appeal.

LORD SUMNER. My Lords, as Scrutton L.J. truly says, the practical question here is to decide whether the respondent's words, which it is conceded acknowledge that a debt has been contracted but has not been paid, are so coupled with words which prevent the possibility of the implication of a promise to pay it, as to destroy the effect of that acknowledgment, or whether, on the other hand, they are only accompanied by other words, which, though they are in themselves less than a promise to pay, do not necessarily put an end to such an implication. I do not propose to read the words used here in the light of words judicially interpreted elsewhere, for everybody agrees that comparison with the words of other debtors is of little use. Still less do I imagine it to be possible to extract anything that deserves to be called a principle from the decisions of three centuries, which have been directed to what is after all the task of decorously disregarding an Act of Parliament. Some "acknowledgments" save the statute and some do

(1) L. R. 10 Q. B. 500.
(2) (1857) 2 H. & N. 306.
(3) [1909] 1 K. B. 405.
(4) 37 Times L. R. 581.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

not. The whole doctrine is purely artificial. Acknowledgments under other Statutes of Limitations dealing with other subject matters than simple debts know nothing of these niceties about fresh promises. The only thing to be done is to ascertain what really are the tests, which have been applied by authority, for determining the class to which any given words belong.

Virtually this is an appeal against *Fettes* v. *Robertson* (1), and accordingly that case must be examined. Certain passages in it speak of the promise to pay, which is an answer to the statute, as "constituting a new cause of action." Bankes L.J. says: "The law is clear. It starts with the Statute of James I., which required an action for debt to be begun within six years next after the cause of action. The next step is judge-made law, which treated a promise to pay a simple contract debt, against which the period of limitation had run, as reviving the liability from the date of the promise and constituting a new cause of action"; and Atkin L.J. says: "The creditor can only meet the statute by showing a new cause of action arising within the period of limitation"; and further: "In the class of acknowledgments now under discussion the previous debt has always been held to be sufficient consideration, though past, to support the fresh implied promise." Later the same Lord Justice says: "I think that we are free to consider the question on principle; and the principle is, looking at the whole of the language used, Are we to infer a promise in fact to pay?" After reading the words relied on, he answers the question thus: "There seems to me to be no new promise on which to found a cause of action."

The first question in this appeal will be, whether these opinions are correct, for, if so, as there certainly was in this case no fresh cause of action upon a new promise, supported by a new consideration moving from the creditor to the debtor, the appeal would fail.

The statement that a new promise must be capable of being inferred is almost universal in the cases, and there are

(1) 37 Times L. R. 581, 582, 584, 586.

several decisions of authority, where it is expressly said that it must amount to a fresh cause of action. It will be enough to refer to three, though, no doubt, there are others: per Byles J. in *Buckmaster* v. *Russell* (1); per Pollock B. in *Chasemore* v. *Turner* (2); per Buckley L.J. in *Cooper* v. *Kendall*. (3) The language of Lord Tenterden in *Tanner* v. *Smart* (4) is puzzling, for first, citing Lord Ellenborough in *Hurst* v. *Parker* (5), he says an acknowledgment of the debt is evidence of a fresh promise, which is "considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states," and then he proceeds, that the only principle, on which a replication of this acknowledgment can be held to be an answer to the statute, is that "an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises, which the declaration states," which were invariably the old ones. Other judgments refer to the question of consideration in terms which import that the promise to be inferred must not only be a new one, for that it is ex hypothesi, since it is only derived from new statements newly made by the debtor, but a new cause of action, to which alone the question of consideration could be relevant. Thus, Wigram V.-C., in the often-quoted passage in *Philips* v. *Philips* (6), says the old debt is revived as a consideration for a new promise, a proposition of which I doubt whether I understand it, though this must be my fault, for it is supported by Blackburn J. in *Chasemore's Case*. (7) *Bateman* v. *Pinder* (8), in which *Yea* v. *Fouraker* (9) was expressly disapproved, explained that, if the plaintiff relies in the action on an acknowledgment given by the defendant since action brought, he will be defeated by the plea of the statute, and his proper course is to discontinue and begin a fresh action. The reason given is that *Tanner* v. *Smart* (4) disavowed the doctrine of presumption of payment

(1) (1861) 10 C. B. (N. S.) 745, 751.
(2) L. R. 10 Q. B. 500, 510.
(3) [1909] 1 K. B. 405, 409.
(4) 6 B. & C. 603, 606.
(5) (1817) 1 B. & Al. 92.
(6) 3 Hare, 281, 300.
(7) L. R. 10 Q. B. 500, 503.
(8) (1842) 3 Q. B. 574.
(9) (1760) 2 Burr. 1099.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

in the case of a stale debt, as though the evidence of the payment had been lost, and decided that the true basis of the statute of James was a distinct promise. It does not seem to me that Lord Tenterden did condemn or needed to condemn the theory of presumption as a part of the explanation of the rule as to acknowledgments, or made what he says about an inferred promise exclusive in itself of the theory of presumed payment; but, be this as it may, whether the acknowledgment be evidence in rebuttal of a presumption or be something which merely revives the original debt, it is difficult to see why it should not be available irrespective of the date of the writ, if it simply goes to the enforcement of the old cause of action, still existing at the date of the writ, though under suspension of the remedy. It seems that the necessity for an acknowledgment preceding the commencement of the action can only have gone upon the ground, that it constituted a fresh enforceable cause of action.

Bland v. *Haselrig* (1) in 1690 seems, however, to have decided the contrary. There was a time-barred promise by four defendants jointly and only one had acknowledged, so as to take the case out of the statute. It was held that the action failed. The promise originally was joint and not several. The revivor was not joint or by all, and no new several contract arose, for that would have required new consideration, the old joint promise not being consideration for a new several promise. That consideration is not needed also appears from *Heylin* v. *Hastings* (2): "It was admitted by all, that if this conditional promise did revive the debt, tho' it was made to the executor after the death of the testator, yet it was sufficient to maintain the issue (viz.) That the Testator assumpsit, because the promise did not give any new cause of action, but only revived the old cause, and was of no other use but to prevent the bar by the Statute of Limitations." That other views have since prevailed as to promises by executors (2 Williams' Saunders, 183) does not affect the significance of these explanations

(1) (1690) 2 Vent. 151. (2) (1698) Carth. 470.

of the nature of acknowledgments. *Hopkins* v. *Logan* (1) may also be referred to as explaining why a transaction, alleged to amount to a verbal account stated, but insufficient for want of fresh consideration, would also fail as an acknowledgment to defeat the Statute of Limitations not for that reason but merely because it was not in writing.

Furthermore, the practice of pleaders is as nearly conclusive as anything can be which is not actual matter of decision. The creditor always declared on the original assumpsit, for the debtor might or might not raise the statute. The cases in Croke's Charles show that this was settled early, for, after first saying that the statute is expressed in the negative and therefore the plaintiff shall fail if it appears on the face of his proceedings that he is out of time, the Courts in *Thursby* v. *Warren* (2) and *Stile* v. *Finch* (3) held, that it is for the debtor to plead the statute, adding that, if he does, the plaintiff must by his replication show good cause why he did not sue within time. This would seem to suggest, that some kind of request not to sue or estoppel was the answer contemplated, but I have nowhere found in the cases that the doctrine of acknowledgment is ever put upon forbearance by the creditor at request or upon reliance on the debtor's conduct as representing that, if he could have time, the statute would not be raised. A mere promise not to plead the statute without consideration is not in itself a sufficient acknowledgment; for the debtor may mean to dispute the debt simply on the merits. To a plea of non assumpsit infra sex annos or actio non accrevit infra sex annos, as the case might be, the plaintiff replied the acknowledgment and, a promise being inferred from it, this "continued" or "revived" or "renewed" the original promise. For example in *Whitehead* v. *Howard* (4) Dallas C.J. says: "To revive a debt by promise . . . . there must be an antecedent debt; and if a promise should be made, where there is no antecedent debt, it would be necessary to frame a special declaration

(1) (1839) 5 M. & W. 241, 248.
(2) (1628) Cro. Car. 159, 160.
(3) (1634) Cro. Car. 381.
(4) (1820) 2 Brod. & B. 372, 375.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

on such a promise." The rule applied only to assumpsit. Had the acknowledgment depended, as a fresh promise to pay would appear to do, on consideration and a fresh cause of action, it would equally have been applicable to actions for any kind of damage after they had become statute-barred, and on the other hand, in cases where the six years had not yet run, a fresh promise or a fresh consideration would have been unnecessary to the creditor and would certainly have been the last thing that the debtor would really intend to give, unless in exchange for an express promise not to sue for a definite time.

It is quite impossible that so many judges should have spoken of the old debt being the consideration for the new promise without their being fully aware that if a new cause of action is meant this is contrary to long settled rules of law as to consideration. They must have spoken of the new promise as something different from a new contract, binding in law as such. Sir William Anson does, it is true, say (Contracts, 14th ed., p. 128) that the case is an exception to the general rule as to past executed consideration, and, while expressly disclaiming reliance on any moral obligation to pay, suggests that in consideration of the creditor's having given everything that the debtor could get out of the contract and being unable, owing to the statute, to get anything which the contract was to have given to him, a promise by the debtor to remove the bar and pay is legally binding. I confess I do not follow this. It is not a consideration that moves to the debtor ; it is a matter of honour, if it is anything, as to which one may say that the creditor has only his own good nature to thank for his loss, and in any case it is a consideration inapplicable when the debt is not yet barred, though the doctrine which it purports to explain applies equally to acknowledgments given before six years have run as to those given afterwards. I find that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgment and

"continues" or "renews" or "establishes" the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise. This alone seems to accord with the language used in *Tanner* v. *Smart* (1) as reproduced in *Hart* v. *Prendergast* (2), where, after Mr. Lush had said in argument, "the questions are, first, does this letter taken altogether, amount to a promise to pay? secondly, does it support the promise laid in the declaration, to pay on request?" the judges, Parke, Alderson and Rolfe BB., said, respectively, that the promise must "fit," or must "maintain," or must "support" the promise declared upon. If so, there is no question of any fresh cause of action.

Next, is the inference of a new promise an inference of law or an inference of fact? Judgments both ways may be cited; for example, in *Morgan* v. *Rowlands* (3), Blackburn J. says the latter, while Cotton L.J., in *Green* v. *Humphreys* (4), says that the inference is for the Court. It is not merely to be rested on a legal obligation arising from action, e.g., the receipt of the money lent, but on the debtor's words, words which themselves must raise a fair inference, that he intends to pay and expresses that intention by his writing. No doubt Blackburn J. relied on *Heyling* v. *Hastings* (5), which says that the implication is for the jury, and in *Green* v. *Humphreys* (6) Fry L.J. uses language which shows that what the debtor had said on another occasion would be evidence to justify the inferences as to his intention to be drawn from the words of his letters, but the general rule was thus stated in 1852 by Parke B.: *Smith* v. *Thorne* (7): "the later cases have decided that the effect of the document set up as an acknowledgment is entirely a question for the Court, unless extrinsic evidence is necessary to qualify or explain it."

The relevance of the distinction is this. If the creditor

(1) 6 B. & C. 603.
(2) 14 M. & W. 741, 743.
(3) L. R. 7 Q. B. 493, 498.
(4) 26 Ch. D. 474, 478.
(5) (1698) 1 Ld. Raym. 389, 421.
(6) 26 Ch. D. 480.
(7) 18 Q. B. 134, 140.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

must get a tribunal of fact to find in his favour an intention to promise to pay or an intention to pay as a real part of the debtor's state of mind at the time when he writes the words of acknowledgment, the doctrine of acknowledgment ceases to be of much use. I agree that there are exceptions and say nothing about the present respondent, but as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure. In this action there is no such finding; the case has run on other lines. It has been discussed solely on the question what the debtor's written words meant, and not what he meant when he wrote them, and in my opinion rightly so. At any rate, when nothing is before the Court but the written acknowledgment, I think the questions are two: (1.) What do the words mean when fairly construed? and (2.) Does that meaning fall on the one side or the other of the line laid down in the authorities as to the requirements of a sufficient acknowledgment? It is not necessary in such a case as this to penetrate the writer's state of mind. There are other connections, in which the debtor's intention as a matter of fact may be essential, e.g., where, in order to understand his written words, the circumstances under which they were written are material, or where, part payment being alleged, the question arises whether the payment was a payment of part so as to imply an intention to promise to pay the rest, or was a payment of that sum not as part but for other reasons, but none of these arise now.

Another point on which conflicting opinions of great weight have been expressed is whether the implied promise is a promise to pay on request or a promise to pay within a reasonable time. The point is of some importance. Can a promise to pay on request, which request may be made forthwith, be consistent with further words, which say, "I am penniless at present and cannot pay forthwith," and, if not, can it be implied from such materials for the purpose of avoiding the operation of the statute? On the other

hand, as a promise to pay within a reasonable time cannot be a promise to pay within a reasonable time only but not afterwards, but must mean a promise to pay, if the creditor gives a reasonable moratorium, that is a condition, and the plaintiff must prove that the condition has been performed. Parke B. is cited for the first in *Smith* v. *Thorne* (1): "There has been no question, since *Tanner* v. *Smart* (2), that an acknowledgment of a debt must, in order to take it out of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request . . . . either by shewing, on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified." In *Tanner* v. *Smart* (2) the words "I cannot pay the debt at present but I will pay it as soon as I can" were held insufficient without proof of ability to pay; that is to say, the promise was not unconditional, and in *Smith* v. *Thorne* (1) Parke B. says, in the course of the argument: "Suppose he had said 'I will pay after a long time.' That would not be a sufficient acknowledgment," without of course proof that the long time had elapsed. On the other hand it has been stated that a promise to pay within a reasonable time may be implied, apparently as an unconditional promise, by Pollock B. in *Chasemore* v. *Turner*. (3) In the present case it is true that a long time had elapsed since the acknowledgment was made, but the fact has not been examined as a question of the fulfilment of a condition, and indeed it is the respondent's case on the letters that times have been exceptional for all of us and particularly hard for him, and the issue, whether or not in the circumstances, including his own, a reasonable time for payment has elapsed, has not been disposed of, if it arises in law. The case has been discussed on the footing that the words raised a promise to pay on request whenever the creditor chose to sue. For my own part I think on the authorities this was right.

(1) 18 Q. B. 134, 143. (2) 6 B. & C. 603.
(3) L. R. 10 Q. B. 500, 511.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

It is now agreed that *Tanner* v. *Smart* constitutes a new point of departure. It was decided in 1827. The position into which the doctrine of acknowledgment under the Statute of Limitations had then drifted was this. It applied only to actions of assumpsit. It was a rule of evidence, for the acknowledgment was proved under a replication to a plea of the statute for the purpose of supporting the original assumpsit, upon which it was that the plaintiff declared. A bare acknowledgment that the debt still subsisted was said to be evidence of a new promise to pay, for all that really mattered was to rebut the statutory presumption after the lapse of six years, that the debt must have been paid: *Hurst* v. *Parker* (1); *Pittam* v. *Foster*. (2) The theory had been pressed so far as to assert that such words as "I have never paid this debt; I never will; it is out of date and no law shall make me pay it" were an acknowledgment of an unpaid debt, sufficient to answer the statute of James, though the debtor was obviously relying on it. This was negatived in *Rowcroft* v. *Lomas* (3), not on the ground that the debtor could not be promising to pay, when he said he could not be made to pay and never would pay, but merely because he also said of the debt, "it is not worth a penny," thereby denying that there ever had been a debt at all. "It is said . . . that, whenever the defendant by his acknowledgment, admits the existence of the debt, this is sufficient to take it out of the statute. I agree to that; but then I ask, where is any such admission?": per Bayley J.

Again, in *Lloyd* v. *Maund* (4), expressly disapproved in 1838 in *Morrell* v. *Frith* (5), it was held that there was evidence of an acknowledgment sufficient to answer the statute, if so accepted by a jury, if it referred to a debt in ambiguous terms neither admitting nor denying it, for "any acknowledgment will take the case out of the statute"; just as "I am ready to account, but nothing is due to you" had been held to be in *Trueman* v. *Fenton*. (6) In 1817,

(1) 1 B. & Al. 92.
(2) (1823) 1 B. & C. 248.
(3) (1816) 4 M. & S. 457, 460.
(4) (1788) 2 T. R. 760.
(5) (1838) 3 M. & W. 402, 405.
(6) (1777) 2 Cowp. 544, 548.

Hellings v. *Shaw* (1), Gibbs C.J. had summed up the paradoxical position in which the decisions stood as follows: "There are three cases in which the words of the statute would discharge the defendant, but in which the Courts have held him liable. One is, where the defendant has admitted that the debt is unpaid, but has stated that it was discharged by lapse of time; another is, where the defendant has stated not that the debt remained due, but that it is discharged by a particular means, to which he has with precision referred himself, and where he has designated that time and mode so strictly, that the Court can say it is impossible it had been discharged in any other mode: there the Courts have said, 'If the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely.' A third case is, where the defendant challenges the plaintiff to produce a particular mode of proof of his liability: there, if the plaintiff produces that proof, the Courts have said 'the defendant shall not be discharged' though the statute says he shall be discharged."

The two species of mischief disclosed by the review of the then state of the law, which Lord Tenterden made in *Tanner* v. *Smart* (2), appear to have been solely (i.) the state of things indicated by the above extracts—namely, that a denial of a debt might still be an acknowledgment of it and a refusal to pay might supply the foundation of an implied promise to pay; and (ii.) the admissibility of spoken words to prove the acknowledgment. *Tanner* v. *Smart* (2) removed the first; 9 Geo. 4, c. 14, the second. It is better to quote Lord Tenterden's own words: "There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal

(1) (1817) 7 Taunt. 608, 612.
(2) 6 B. & C. 603, 604, 609.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

void, and considers the acknowledgment of itself an unconditional answer to the statute." To this he opposes other and preferable authorities, and sums them up thus: "All these cases proceed upon the principle that . . . . an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid, and is still subsisting, it has no effect." The issue might be put shortly thus: "Does the debtor simply say that he has never paid or does he go on to say that he will pay with or without conditions?" There is nothing to show that there was any real concern in Lord Tenterden's mind about the prevailing or any legal theory on which to found the rule about an implied promise, nor indeed had the theory ever been more than the mode by which from time to time lawyers endeavoured to justify a rule which they found established and were bound to follow, though the original reason for it had not been recorded, when it was first introduced. Neither presumption of payment nor implied promise is coeval with the statute of James. I can find no earlier mention of the latter than *Heyling* v. *Hastings* (10 Will. 3) (1) in which no prior authorities are cited, though Scroggs C.J. had indeed said in *Dickson* v. *Thomson* (2) in 32 Car. 2, but without explaining why, that "promise of payment within the six years . . . . will evade the Statute of Limitations; but confession, or only acknowledgment that he owed the plaintiff so much will not do it." Even in *Heyling* v. *Hastings* (1) the theory of presumption of payment and lost vouchers is mentioned along with the implication of a promise, as if they were regarded as consistent and recognized views. Whether the two are inconsistent or not, as Blackburn J. says in *Morgan* v. *Rowlands* (3), the former was put forward as late as 1816 by Lord Ellenborough and Buller J., and in 1851 was still mentioned as a subsisting and maintainable basis for the rule: Pigot C.B., *Maunsell* v. *Hedges*.' (4) Rarely, if ever, has there been a new consideration

(1) 1 Ld. Raym. 389, 421.
(2) (1680) 2 Show. 126.
(3) (1872) L. R. 7 Q. B. 493, 497.
(4) (1851) 2 Ir. C. L. Rep. 88, 100.

or a new contract; rarely has there been any question raised for many years past except to decide whether the particular words used amounted to an unqualified admission or to a conditional admission or to a denial, coupled with some ambiguous words of admission. The contemporary opinion of the profession as to the effect of *Tanner* v. *Smart* I may perhaps take from a standard text book. Starkie, in his Law of Evidence, 2nd ed., vol. ii., p. 482, thus sums up the law as it stood in 1832. "Two circumstances must be proved: 1st, that a debt once existed; 2ndly, it must appear from the defendant's acknowledgment that it continued to be a debt within the six years. If evidence be given *aliunde* to prove the existence of the debt, then payments by the defendant or statements by him, which now must be in writing, are admissible in evidence to show the continuance of the debt." How the matter stood thirty-six years afterwards may be shown in the same way. The note in the third edition of Bullen and Leake (p. 642) says that the effect of the statute may be avoided by "a subsequent acknowledgment of the debt remaining due. . . . . If at any time after a debt is due, the debtor renews his promise to pay it, or makes such an unqualified acknowledgment of the debt being due that a promise to pay it may be inferred therefrom, he renews his liability from the date of such promise or acknowledgment, and cannot avail himself of the Statute of Limitations in respect of the preceding lapse of time."

After all, what the promise effects expressly, the acknowledgment effects by implication. With an express promise, whether it is qualified or unqualified, absolute or nullified, and with an acknowledgment, the question must be the same; if it is accompanied by other words we have to ask do they nullify or qualify the acknowledgment or simply leave it absolute? I may cite two decisions of the Court of Appeal prior to *Fettes* v. *Robertson* (1) which take this line. *Cooper* v. *Kendall* (2) adopts the language of *Lee* v. *Wilmot* (3): "If there be a distinct acknowledgment it is not necessary

(1) 37 Times L. R. 581. (2) [1909] 1 K. B. 405, 407.
(3) L. R. 1 Ex. 364, 367.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference," and of *Chasemore* v. *Turner* (1): "What we are to consider is, whether there is coupled with that unconditional acknowledgment of the debt a conditional or limited promise, so as to negative the implication of an unconditional promise to pay which would in general arise from an unconditional acknowledgment of the debt." In the earlier case of *Green* v. *Humphreys* (2) Cotton, Bowen and Fry L.JJ. express a view which gets rid of the old difficulties and in my opinion ought to be adopted. Cotton L.J. recites the familiar formula: "The rule seems to be this, that if there is an absolute unconditional acknowledgment, not controlled by any other language in the letter, then the Court comes to the conclusion that by that acknowledgment the party intends a promise to pay that which he acknowledges to be due" and he concludes ". . . . on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer." The judgments of Bowen and Fry L.JJ. are to the same effect. The former says: "It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment, a promise to pay will be inferred"; and Fry L.J. asks: "Now what is an acknowledgment? In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received. . . . . In order to take the case out of the statute, there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt." All the Lords Justices, it will be seen, in stating the settled rule, direct their attention to the character of the words used and not to their effect as creating a new obligation. The result

(1) L. R. 10 Q. B. 500, 517. (2) 26 Ch. D. 474, 478, 479, 481.

is that words will prevent or not prevent the operation of the statute according as they have or have not a promissory meaning, either expressly or by inference. On what legal principle it is that such words are given such an effect on the operation of the statute, is a question into which they evidently think it needless to inquire, in view of the well settled character of the rule.

The foregoing considerations seem to me to lead to the conclusion that the implication of a promise, which is fixed as a test in *Tanner* v. *Smart* (1), is rather the mode of determining the character of the acknowledgment than the basis in itself of the debtor's revived liability. Lord Tenterden's Act, though it is only an evidentiary enactment, gave statutory recognition to a series of decisions, which seem to be in conflict with the plain words of the statute of James, and its language must have been framed to give a comprehensive expression to the law as recently laid down. It recognized that a "new or continuing contract," if inferable, would suffice. What exactly it meant by an acknowledgment or promise has been questioned. Tindal C.J., in *Linsell* v. *Bonsor* (2) says that, having used two words, the Legislature must have meant two separate things, which is theoretically right; Channell B., in *Lee* v. *Wilmot* (3), says that there is no real difference between the two things, and this is practically not far wrong. Express promises, of course, are not now in question; they have simply to be construed. The acknowledgment, which is the alternative to a promise, was intended to be a promissory acknowledgment as contrasted with a repudiatory one, an acknowledgment, which can be regarded as the foundation of a promise, and is not the expression of a denial of liability or a refusal to pay. It is to be observed that the word used is merely promise, not contract or obligation or assumpsit. The distinction is between saying, "It is my liability and an admitted liability," and saying, "it was, and perhaps is, my liability, but it is disputed and will not be performed." This distinction

(1) 6 B. & C. 603. (2) (1835) 2 Bing N. C. 241.
(3) L. R. 1 Ex. 364, 367.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

sufficiently met the mischief of the decisions as they stood before *Tanner* v. *Smart* (1), and there was no occasion to modify them further. I think the effect is this: the new promise revives the old debt, but does not create a new one; it revives it, however, not simpliciter, but subject to any conditions attached to the words, which operate the revival: *Philips* v. *Philips* (2); and it may be inferred or not inferred according as it is or is not attended by other words, which leave it standing and unqualified or limit or destroy its effect. Before *Tanner* v. *Smart* (1) "I will never pay my debt; it is statute barred," might, it is hardly too much to say, have been used to raise this implied promise: "I will pay my debt whenever you like, though it is statute barred." The fact that from the pleaders' point of view non assumpsit infra sex annos contained in itself the acknowledgment, assumpsit ante sex annos (Williams' Saunders, ii., 164: notes to *Hodsden* v. *Harridge*) made the doctrine all the more formidable. Since *Tanner* v. *Smart* (1), the whole of the words used must be considered to see (1.) whether there is an acknowledgment at all; (2.) whether that acknowledgment is limited or made subject to any condition, mere words of hope and fear, mere prayers for mercy, not amounting to such a limitation or negativing the technical implication of a new assumpsit to call the old one out of abeyance.

The decisions on the exact meaning and effect of the precise words employed by generations of shifty debtors are, it is agreed on all hands, irreconcilable. It may, perhaps, serve in some degree to mitigate the appearance of hopeless contradiction if the theory, on which the decisions have gone, can, to some extent, be unified. I do not think it has been as self-contradictory as is generally supposed. The Restoration lawyers, no doubt, were brought face to face with two things: a multitude of debts still unpaid but long irrecoverable owing to the Civil War, and a statute, which, in terms, left the creditor without remedy. When first new promises and acknowledgments came into recognition, and why, we do not know, but ultimately it became necessary to

(1) 6 B. & C. 603. (2) 3 Hare, 281, 299.

invent an explanation, where a simple and existing rule of practice had to be extended to complex cases. Logically, if not chronologically, a succession of Courts reasoned thus. The statute is in derogation of a common law right to sue for a debt, so long as it remains unpaid. It cannot therefore be so universal as its words import. What is its object? To prevent a debtor, who has paid, but has lost the evidence of the payment, from being made to pay again. What if the debtor himself says that he has not paid? Why, then he ought to pay, since he admits himself that he ought to pay. How is such an admission, firstly, to be evidenced, and, secondly, to be reconciled with the Act? As to the first, there were two schools, one saying that non-payment was non-payment, and non-payment was evidenced by saying that the debt was unpaid, no matter what else might be said at the same time. I confess I think there is a good deal in this. The other said that only a clean acknowledgment would do, and this has prevailed. The first school could not reconcile itself with the Act; it had to defy it. The second had the merit of appearing to do so, for it said that the original loan and the subsequent promise formed one continuing transaction; that the creditor had made the loan once and for all, while the debtor had not finished promising as long as he went on promising, and therefore his assumpsit was still in being till within six years of the action. The explanation wears an aspect of unreality, but at least it hangs together, and explains why the only practical point now is the unconditioned and uncontrolled character of the acknowledgment, and not its intention in truth or its novelty as a fresh cause of action in law.

My Lords, the rest is a question of construction. Additional words pointing out how little hope of payment there is do not necessarily cancel words which impliedly acknowledge that the money ought to be paid. Many people borrow cash, from which the law infers a promise to repay, without having either the means, the prospect, the intention or the desire ever to return a penny of it. I appreciate, however, that, if all that can be inferred from the so-called

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Sumner.

acknowledgment is the proposition "I will pay, but all the same I will never pay," though the first words are words of promise and the last are words of prophecy, the total effect is nil. The last words cancel the first.

It is unnecessary for me to criticise the respondent's language word for word after what your Lordships have already said. It amounts, in my opinion, to the statement, "you affirm my continuing indebtedness, and I do not deny it; be it so. I am now without funds, but I do not exclude the possibility of paying at some time." The first words clearly acknowledge the debt; the latter neither deny it, nor negative the acknowledgment nor impose conditions on the liability. After all a liability is not nullified because the debtor has no means. He may be sued to judgment and made bankrupt or, at any rate, the simple contract debt may be merged in the speciality debt and given a prolonged lease of life, and I do not think it enough for the debtor to say, "When I can pay, who can tell?" to destroy the acknowledgment as a basis for the required promise. Had the debtor said, as Smart said, "I cannot pay the debt at present, but I will pay it as soon as I can," I suppose the result would have been otherwise, for on such nice distinctions do these things turn; but, as it is, I think the appeal succeeds and the judgment of Bailhache J. should be restored.

LORD WRENBURY. My Lords, in cases such as the present the difficulty lies not in ascertaining the principle and rule of law to be applied, but in applying it when ascertained to the language to be construed in the particular case. In 1884, Bowen L.J. said, in *Green* v. *Humphreys* (1), that the law had been clear for fifty years; thirty-eight years more have passed and the law is clear still. Throughout the decisions—and they are very numerous—I find little, if any, difference of opinion as to the principle and rule of law, yet the cases are often difficult to reconcile. Taking this particular case, two learned judges have come to one conclusion and other two to another, yet I do not trace that

(1) 26 Ch. D. 474, 479.

they differed as to the law. Bankes L.J. does not seem to quarrel with the law as laid down by Bailhache J., and I doubt whether the latter would find any fault with the law laid down by the former. Yet they arrived at different conclusions. The point of difference is always reached when the construction of the language used in the acknowledgment comes in question. The only question in the present case is as to the meaning of the words in the documents which the debtor has signed.

The principle and rule of law I take to be as follows. If there is an acknowledgment in writing which satisfies the Act (9 Geo. 4, c. 14) there arises by implication of law a promise by the debtor to pay the debt. It is well settled that the existing debt is consideration for the new promise. An action will lie upon the new promise if brought within six years from the date of the promise. But the acknowledgment in writing may not be an acknowledgment and no more. It may proceed to use language which modifies, supersedes or displaces the promise which in the absence of such language the law would imply. For the acknowledgment is only evidence of a promise to pay: *Tanner* v. *Smart* (1), and other evidence may displace it. To quote Lord Tenterden in *Tanner* v. *Smart* (1): "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?" Thus if the debtor writes, "I acknowledge the debt, but I refuse to pay it," the refusal negatives any implied promise to pay. Again if he adds to the acknowledgment an express promise, that express promise will modify and exclude the implied promise. Thus if he write, "I acknowledge the debt and will pay it you six months hence" the implied promise which would be a promise to pay forthwith is superseded by the express promise to "pay six months hence," and an action cannot be brought until

(1) 6 B. & C. 603, 609.

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Wrenbury.

the six months have expired. Or again, if he writes, "I acknowledge the debt and will pay it if I succeed in selling my house," that express promise excludes the implied promise and an action will not lie unless and until the condition is satisfied and the house is sold. Briefly, in every case it is necessary to see (1.) whether there is an acknowledgment in writing; (2.) whether there is language which excludes or modifies the promise which, in the absence of anything to the contrary, the law implies from the acknowledgment; and (3.) (if there is such language) whether (*a*) it amounts to a refusal to pay, in which case there is no promise, whether implied or expressed, or (*b*) the facts are such as that the express promise if there be one has matured by effluxion of the time or satisfaction of the condition upon which the promise was expressed so take effect.

I have to apply these principles to the present case. On November 4, 1915, Mr. Benson wrote to Mr. Hemmerde: "I beg to make application for payment of money lent, viz., 700*l.* on the 2nd March, 1910 and 300*l.* on March 16th, 1910, together with interest as agreed at the rate of 7 per cent. per annum." On the same November 4, 1915, Mr. Hemmerde replied to that letter: "I cannot at present hold out the slightest hope of paying you the capital." The words "the capital" plainly refer to the two capital sums of 700*l.* and 300*l.* stated in Mr. Benson's letter. Mr. Benson wrote in reply on November 5 and on November 7 Mr. Hemmerde wrote: "It is not that I won't pay you but that I can't do so," and further, "What I wrote was not that I saw no prospect at present of being able to repay the capital but that I saw no prospect of being able to pay the capital at present."

Mr. Hemmerde was mistaken in making in his letter of November 7 this supposed correction in his language in his letter of November 4. The letter of November 4 is as quoted above. There is little importance in the supposed correction. If anything the correction is adverse to the debtor. It uses the word "repay" which was not in the letter of November 4, and also the variation of language is more in

favour of the meaning that there is a prospect of paying at some time, although not at present. I do not, however, found my judgment upon either of these considerations.

What I do find is that the letter of November 4 acknowledges the debt. In reply to a letter stating the amount of the debt the debtor writes as to "paying you the capital." This is an acknowledgment that the writer is debtor in the amounts identified by the creditor coupled with a statement that he cannot "pay" or, as in the letter of November 7, "repay" the amount. If there is nothing more the law implies a new promise to pay. There is something more. Does it amount to a refusal to pay? Obviously it does not. Does it amount to an express promise to pay which will modify or exclude the implied promise to pay? Again I answer in the negative. There is no express promise to pay at all. There is only a statement of inability to pay, a statement that payment at present is out of the question. The words "It is not that I won't pay you but that I cannot do so" do not, I agree, bear the meaning which would result from striking out the double negative and reading it "It is that I will pay you," but they do bear the meaning "It is not that I refuse to pay you." There is no refusal here. Again I find no express promise to pay of any kind. I find only a statement of inability to pay. A statement of inability to pay is in no way inconsistent with an implied promise to pay. The implied promise therefore stands good. To test the matter, write into the document the promise which the law implies. It will then run as follows: "I acknowledge that I owe you 700*l.* and 300*l.*, with interest at 7 per cent. per annum and (by implication of law) I promise to pay you but I cannot see any prospect of paying you at present." This is a perfectly consistent statement and that in my judgment is the true construction of these letters.

The respondent sought to find something to help him in *Tanner* v. *Smart*. That was, I think, a very plain case. The words were: "I cannot pay the debt at present but I will pay it as soon as I can." There was here an express promise

H. L. (E.) 1922 SPENCER v. HEMMERDE. Lord Wrenbury.

and it was a promise to pay "as soon as I can." The express promise overrode and excluded any implied promise which would be a promise to pay forthwith and substituted a promise to pay "as soon as I can." To support an action it was necessary to prove ability to pay. There was no proof of ability to pay. An order was made for a new trial. In other words the question of ability to pay was to be tried and if proved the plaintiff would succeed.

In my judgment this appeal should be allowed and judgment given for the appellant with costs both here and below.

LORD CARSON. My Lords, I confess that during the arguments before this House I found some difficulty in arriving at the conclusion that the words used by the respondent in the letters quoted, although plainly acknowledging the debt sued for, did not prevent the possibility of the implication of a promise to pay it. Having had, however, the advantage of reading the speeches of your Lordships and the exhaustive consideration of the law involved, I have come to the conclusion that looking at the whole of the language used we ought to infer a promise in fact to pay. I therefore agree that this appeal should be allowed, and that the judgment of Bailhache J. should be restored.

Order of the Court of Appeal reversed, and judgment of Bailhache J. restored. The respondent to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 28, 1922.

Solicitors for the appellant: *Wordsworth, Porter & Shaw.*
Solicitors for the respondent: *Guedalla, Jacobson & Spyer.*

[PRIVY COUNCIL.]

YORKSHIRE INSURANCE COMPANY, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

CRAINE . . . . . RESPONDENT.

J. C.* 1922 July 13.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Insurance (Fire)—Conditions of Policy—Breach of Condition—Estoppel of Insurer—Delivery of Particulars of Loss—Insurer taking Possession.

The respondent insured goods in his business premises against fire under a policy issued by the appellant company. The policy contained a condition that the assured was to give notice of any loss or damage under the policy forthwith, and within a specified time was to deliver detailed particulars; failure to observe this condition was to preclude the assured from recovering. There was a further condition, under the head "salvage," by which the company, so long as a claim was not adjusted, without incurring any further liability, might take possession of the premises and of any goods thereon at the date of the fire, with power to sell the goods. A fire having occurred the respondent gave notice of it forthwith. Before the expiration of the time specified for the delivery of the particulars, the appellant company took possession under the condition above referred to; they remained in possession for four months, but did not sell any of the goods. Particulars were delivered by the respondent but after the specified period:—

Held, in an action upon the policy, that the appellant company was precluded from relying upon the failure to deliver the particulars within the time specified.

Judgment of the High Court of Australia affirmed.

APPEAL from a judgment of the High Court of Australia (August 31, 1920) reversing a judgment of the Supreme Court of Victoria (December 16, 1919).

The respondent sued the two appellant companies in the Supreme Court of Victoria to recover under policies of insurance against fire issued by them respectively. The facts of the case are fully stated in the judgment of the Judicial Committee. The policies sued on were in the same terms. In addition to conditions 11 and 12, which are set out in the judgment, condition 19 was referred to in the argument and was as

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

J. C. 1922 YORKSHIRE INSURANCE CO. v. CRAINE.

follows: "19.—Waiver. No provision or requirement of this policy requiring any matter or thing to be done, or to be written or endorsed hereon, shall be deemed waived by reason of any alleged notice or waiver which has not been expressly written or endorsed hereon, nor shall the Company be deemed to have waived any provision or condition of this policy, or any forfeiture thereunder, by any requirement, act, or proceeding on its part relating to the appraisement of any alleged loss, unless such provision, condition or forfeiture, be expressly stated in writing to be waived by the Company."

The actions were tried by the Chief Justice, Sir William Irvine, sitting with a jury, and judgment was given for the defendants. On appeal to the High Court of Australia, that Court (Knox C.J., Isaacs and Starke JJ.) reversed the decision, and entered judgment for the plaintiff. The appeal is reported at 28 C. L. R. 305.

1922. May 5, 8. *R. A. Wright K.C.* and *Lowenthal* for the appellants. The appellants were entitled to rely upon condition 11. That condition and condition 12 are separate and independent; so long as the assured is maintaining a claim, the company can exercise their rights under condition 12 without prejudicing their rights under condition 11. That construction of condition 12 is to the advantage of the assured, since otherwise the company would be compelled to act on a breach of condition 11, whereas after opportunities for investigation they may waive the breach in accordance with condition 19. Condition 19 is a complete answer to any case of waiver; it applies also to estoppel. But in any case there was no estoppel; the entry into possession was at most an expression of intention, and some evidence of a new contract. [Reference was made to *George Whitechurch, Ld.* v. *Cavanagh* (1) and *Low* v. *Bouverie*. (2)] With regard to condition 19, *Rex* v. *Paulson* (3) is distinguishable, there being there an election to treat a contract as subsisting.

Langdon K.C. and *Sir H. Cassie Holden* for the respondent. The

(1) [1902] A. C. 117, 130. (2) [1891] 3 Ch. 82, 87.
(3) [1921] 1 A. C. 271.

whole course of the appellants' conduct, including the entering into possession, amounted to a representation that there was no intention to rely upon condition 11. State of mind is a question of fact: *Edgington* v. *Fitzmaurice*. (1) It was taken in the Courts below as admitted that the plaintiff had acted on the representation. That gave rise to a contract or licence: *Freeman* v. *Cooke*. (2) It is a reasonable construction of the policy that condition 12 cannot be exercised without abandoning condition 11. The words "without incurring any liability" are not apt words in relation to the preserving of a defence; they mean "without incurring any legal liability." The facts in *Rex* v. *Paulson* (3), as to estoppel, were at least analogous to those in the present case.

Lowenthal replied.

July 20. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the High Court of Australia dated August 31, 1920, reversing a judgment given by the Chief Justice of Victoria, sitting with a jury, in favour of the appellants in two actions tried together. Thomas Craine, the present respondent, was the plaintiff in both actions; the Yorkshire Insurance Company being the defendants in one, and the Colonial Mutual Fire Insurance Company the defendants in the other. For convenience' sake the two companies have in the proceedings been referred to respectively as the Yorkshire company and the Colonial company.

The action against the Yorkshire company was brought to recover under three policies of insurance issued by them the loss the plaintiff alleged he suffered by reason of the destruction by fire of certain motor cars, his property, insured under the said policies; and the action against the Colonial company was brought to recover the loss resulting from the destruction by the same fire of three other and different motor cars insured by the latter company under three policies similar in terms to those issued by the Yorkshire company. Statements of

(1) (1885) 29 Ch. D. 459, 483. (2) (1848) 2 Ex. 654.
(3) [1921] 1 A. C. 271.

J. C. 1922 YORKSHIRE INSURANCE CO. v. CRAINE.

defence raising many defences, including fraud, were filed in both actions. But a verdict was found against the companies on the issues raised on these defences, and in reference to all those issues save those raised on the defence based upon condition 11 attached to the policies, the findings of the jury are not now challenged.

Conditions 11 and 12 of the policies run as follows: "11—OCCURRENCE OF FIRE. On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the Company, and must within fifteen days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; and must at all times at his own expense produce and give to the Company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the Company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith; and if the insurance is subject to average, the insured must within the aforesaid fifteen days, or such further time as the Company may in writing allow in that behalf, deliver to the Company an account of all the property insured with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with.

"12—SALVAGE. On the happening of any loss or damage, the Company may, so long as the claim is not adjusted without thereby incurring any liability: (A) Enter, and take, and keep possession of the building or premises where the loss or damage has happened. (B) Take possession of, or require to be delivered to it, any property of the insured in the building or on the premises at the time of the loss or damage. (C) Examine, sort, arrange, or remove all or any of such property. (D) Sell or dispose of, for account of whom it may concern,

any salvage or other property taken possession of or removed. In no case shall the Company be obliged to undertake the sale or disposal of damaged goods, nor shall the insured under any circumstances have the right to abandon to the Company any property, damaged or undamaged, whether taken possession of by the Company or not. Entry upon or taking possession of the premises by the Company shall not be taken as recognition of abandonment by the insured."

It will be observed that the claim which, under condition 11, is to be delivered within fifteen days after the loss or damage or such further time as may be allowed in that behalf, must contain many things as particulars: (1.) an account as may be reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; (2.) a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith. The information required is obviously very full. The truth of it and of all matters connected with it must be verified by a declaration on oath. One would suppose that in such a business matter as this insurance, if all the information thus required was furnished, the company would be able to make up their minds whether or not the claim was a valid one, and represented a real and genuine loss, although they might dispute the amount claimed. The penalty inflicted upon the assured in case all the terms of condition 11 be not complied with is that no amount should be payable to the assured under the policy of insurance. The company are thus free to take an objection to the non-performance of any of these terms and refuse to pay anything to the insured. The important question remains, can the company do this after they have availed themselves and while they are availing themselves of the powers conferred upon them by condition 12? Those powers are vast, they are far-reaching, and might in their operation and results inflict serious pecuniary loss on the assured. It may well be that it would be just and fair and businesslike to empower each company to exercise all or any of those powers while the amount of the

J. C. 1922 YORKSHIRE INSURANCE CO. v. CRAINE.

claim of the assured was not adjusted; but it would be most oppressive and unbusinesslike to enable them after they had exercised these or any of these powers to say to assured, your claim did not comply with all the terms of condition 11, therefore, though we have taken possession of your premises and sold your property, we will pay you nothing under the policies.

In their Lordships' view the proper construction of condition 12 protects the assured against treatment such as that, and of course the assured is only bound by his contract as properly construed. The opening words of the condition show clearly that the assured is so protected. They run as follows: "On the happening of any loss or damage the Company may, so long as the claim is not adjusted, without incurring any liability, etc." These words suggest adjustment is all that remains to be done to the claim. They presuppose that a valid claim against the company has been made and that all that remains to be done is to adjust the amount of it. If no claim had been made, or a claim is so defective that it gives no right to obtain any money under the policy, it would be ridiculous to refer to the adjustment of it. Until the company accept the claim of the assured as valid, imposing on them a liability, there would be nothing to adjust. Until the company accept the claim as valid they may insist they owe nothing under the policy and a cipher cannot be adjusted. These two conditions are interdependent the one upon the other, and the powers conferred by the second are only authorized to be used when the requirements of the first as to claims, at least, have been fulfilled. If that be so then, in their Lordships' view, it is not competent for either of the companies, if they have gone into or continued in the possession of the premises of the assured after they have received and accepted the assured claims to contend that those claims fail to comply with the terms of condition 11. They are estopped by their conduct from doing so, since they cannot insist that their own action was unauthorized and illegal. It could only be legal if claims valid or accepted as valid had been made by the insured upon and delivered to them.

Many authorities on the subject of estoppel by conduct might be cited; for instance, in *Wing* v. *Harvey* (1), it was held in the Court of Appeal that the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy, estopped him from averring that by reason of those circumstances the policy was not valid. Again, a man who acting as a director of a company takes part in the allotment of shares to himself, cannot in any action for calls be permitted to say that his appointment as director or the allotment to him of the shares was irregular and ultra vires. So the companies here, if by the act of their authorized agent they go into possession and retained possession of the premises of the assured, expel him from there and only allow him to enter into them by their permission, they cannot be permitted to say that the circumstances legalising their action did not in fact exist. The ruling on this point would involve nothing more than the decision of the proper construction of two clauses in a written document. As will presently be shown, there is in reality no controverted issue of fact to be considered or ruled upon.

It is necessary, however, to refer to some facts on which this question depends which are in substance undisputed. The fire took place on September 30, 1917. The claim should have been delivered on or before October 15, 1917. An application in writing was on that day made to extend for a week the time to lodge formal claims. By a letter dated October 15, 1917, written by Mr. Leslie on behalf of the companies, the time was extended up to 4 o'clock on October 22, 1917. A further extension of time was asked for, and by letter of October 24, 1917, granted—namely, up to 12 o'clock on Friday, October 26. The claims were not lodged within that time, and Mr. Leslie on that day wrote to the representative of the insured, the plaintiff, a letter containing the following paragraph: "These claims should have been lodged not later than 12 o'clock noon of this date, but were only left at my office without any covering letter after 3 o'clock this afternoon. I therefore acknowledge

(1) (1854) 5 D. M. & G. 265.

J. C. 1922 YORKSHIRE INSURANCE CO. v. CRAINE.

their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions." On October 29, 1917, the plaintiff Craine wrote to both the companies a letter complaining of the delay. It ran as follows: "It is now four weeks since the disastrous fire occurred to my premises at 50, City Road, South Melbourne. The reason for this long delay in adjustment is not apparent. A settlement could and should have been effected within forty-eight hours. As you are no doubt aware, my machinery and plant were not insured, and have been exposed in wet weather since the fire. My men and I have not been allowed on the premises to attend to it, and this salvaging (sic) of the undestroyed property owing to the arbitrary manner your adjuster has adopted. The keeping of my premises closed for such an unreasonable time has been a very serious loss to me and this annoying and expensive delay is being adversely commented upon by policy holders of your Company." In reply to this letter the plaintiff received from each of the companies a letter stating that as the matter was in the hands of Mr. Leslie the plaintiff's letter had been forwarded to him for his attention. Mr. F. F. Leslie is thus by both companies constituted and held out to be their representative and agent, fully authorized to deal on their behalf with the plaintiff's claims.

It is sworn to by the assured and not disputed by Leslie that the latter went into possession of the assured premises on October 5, 1917, and held possession of them till February 4, 1918. The assured had been kept out of possession of them and only allowed to enter them by Leslie's permission.

He had an interview with Leslie on October 2, 1917. On the same day and presumably after that interview Leslie wrote plaintiff a letter in which he states that he, Leslie, directed plaintiff's attention to the conditions of the policies, asked him to comply with them and formally to acquaint him, Leslie, with the insurances on six motor cars, which he names stock-in-trade of coachbuilder, machinery and plant, etc., and then proceeds as follows: "I require of you to forthwith

produce and give me all books, papers or other documents relating to your business which you have in your possession. Having regard to your statement that the last stock sheets have been destroyed, I require you to deliver to me the copy of your last Income Tax Return, which you stated is in your possession. I also await in due course your claims for the loss and damage: (1.) As to each of the motor cars above enumerated. (2.) As to the stock-in-trade, with details, showing of what this consisted, of its aggregate value at the time of the fire, and of the value of the salvage. You will be permitted access to the premises between the hours of 9 and 5 P.M. at any time you may make an appointment with me for this purpose. Of course, you will be granted whatever opportunity you desire for the examination of the documents and stock on the premises to enable you to fulfil my requirements, and support your claim. . . . . As to the foregoing information, will you please let me have your prompt compliance with my request for books, documents and list of insurances; as to all the other information I recognise that it will take time for you to prepare the necessary data, but I trust you will do this as quickly as possible."

From the paragraph preceding the last portion of this letter it is clear that Leslie had made up his mind to go into possession of the plaintiff's premises when he wrote. He states the terms upon which the assured will be permitted to enter his own premises, and notwithstanding the time given by the statement in the last paragraph, he went into possession forty-eight hours after this paragraph was written, and ten days before the time was up for delivering the claims —namely, October 15, 1917. It may well be that Leslie, acting upon behalf of the companies, was entitled under condition 11 to receive all that he demanded in this letter, and that if his request was not complied with the company might repudiate all liability. But it is obvious that Leslie went into possession before the plaintiff was in any default whatever, and did not pretend to do so because of any default on the part of the plaintiff. It appears to their Lordships

J. C. 1922 YORKSHIRE INSURANCE CO. v. CRAINE.

impossible to contend that condition 12 authorized or justified any such action.

On the receipt of this letter the plaintiff appointed one F. W. Spry, a public accountant, to act on his behalf in this matter under the direction, however, of Mr. Doria, the plaintiff's solicitor. This gentleman had interviews with Leslie on October 8 and 12, 1917. There was some controversy whether what was then said was not stipulated to be without prejudice. The learned judge admitted the evidence of what passed, but it is not desirable because of this controversy to base this judgment in any way upon it. On October 26 Spry delivered at Leslie's office seven distinct claims in respect of the different items of loss mentioned in them. Each claim was duly verified by a statutory declaration. Spry received from Leslie a letter of the same date, the relevant parts of which run as follows: "Declaration and statement of claim against the Yorkshire Insurance Company for 197*l.* in respect of the Talbot Motor Car.—These claims should have been lodged not later than 12 o'clock noon of this date, but were only left at my office, without any covering letter, after 3 o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions. A casual glance at the claim forms shows that some at least of them are irregularly executed. I will advise you in due course of my further requisitions in the matter of these claims. In the meantime, I call upon Mr. Craine to forthwith give full answers to the questions and requisitions already made. I also have to request confirmation in writing of the verbal intimation given and accepted, and under which I have been acting, of the appointment you hold from Mr. Craine to represent him in all matters appertaining to his claim against the several companies for whom I am acting."

The plaintiff then wrote to the company the rather plaintive letter of October 29, already set out. The answer received was dated October 30, and said: "Replying to your letter, I have to say that the reason for the delay in the adjustment

of your claims is known, and should be apparent to you. So far as your machinery, plant and tools are concerned, your statement that you and your men have not been allowed to attend to these is not correct. You and your foreman have been given every facility for being on the premises and the salvage of these particular interests was urged upon you for your own benefit. It was even suggested to you by me that you should collect all these things together and remove them from the premises if you so desired. As to the keeping of your business 'closed,' I know of nothing to prevent the continuation of your business. In regard to the settlements of claims these are not yet adjusted, and no amounts are payable unless and until you comply with the policy conditions."

The plaintiff received another letter from Mr. Leslie of the same date, repeating the requisitions made in his letters of October 5 and 15, 1917, making many further requisitions, stating that it was his intention to sell the salvage stock, asking him to remove the machinery and other things not insured, informing him that failing to give the information required about certain articles named would involve the sale of them on account of whom it might concern, in terms of condition 12 of the policy. After stating that certain of the claim forms were not signed, he said: "Regarding your claims generally—I append hereto further requisitions and call upon you to give this further information and proofs as asked for by 4 P.M. on Thursday next, November 1."

The plaintiff's solicitor, Mr. Doria, called next day, October 31, on Leslie. This gentleman was examined at the trial. He said Leslie produced to them the claims delivered on October 26, saying: "Look, Doria, they are not in order. Some exhibits are not signed. The best thing to do is to take them all away and have them resworn and let me have them back again at once"; that he, Leslie, then pointed out in each form what Craine or Spry had neglected to do; that he, Doria, then said, "Very well, Mr. Leslie, I will have that done"; that he returned to his office, taking the forms with him; saw Craine later in the day, filled up some of the forms himself, his clerk filling up the others, had them resworn,

J. C.
1922
YORKSHIRE INSURANCE CO. v. CRAINE.

told his clerk to write a letter to Leslie as directed; took this letter and declaration back to Leslie's office, saw him and said: "Mr. Leslie, I have the documents now all in order. Would you be good enough to look through them"; that Leslie then examined each one of them and said, "They are all right now"; that he, Doria, then said, "Will you see Spry?" and Leslie replied, "Yes, I will see Spry"; that the witness then said, "What about the buildings?" and Leslie replied, "Do not bother about the buildings, I have made an offer to the bank." He then said, "I will see Spry later and we will see what we can do." The evidence of Mr. Leslie in reference to what took place at this interview is not in conflict with that of Mr. Doria.

From November 5, 1917, till February 8, 1918, several letters passed between the solicitor of the plaintiff and the solicitors of the defendants, the latter insisting that all the information required by their requisitions had not been furnished, and pointing out again and again that until that was done nothing was payable by the companies under the policies, and the former stating that the plaintiff had complied with the requisitions and given all the information he possibly could give.

The judge at the trial on the suggestion, or indeed rather at the request of the counsel for the companies, left only one question to the jury—namely, this: Did the defendants represent to the plaintiff that they did not intend to rely upon the claims having been put in too late? To which the jury answered: Yes, they waived their claims.

It will be observed that no question was left to the jury touching the alleged omissions of the plaintiff to furnish to Leslie the copious information demanded by the numerous requisitions addressed to him by the latter. Neither is any question left to them as to the insufficiency or defectiveness in form of the claims when ultimately delivered corrected. The timely delivery of the claims was treated as the question on which the case turned. Their Lordships thoroughly concur with the following observations made by Isaacs J. in the High Court. He said: "Having regard to the well-known

principles as to the conduct of a party at a trial laid down and acted on in *Brown* v. *Dunn* (1), in *Nevill* v. *Fine Art Insurance Co.* (2), and *Seaton* v. *Burnand* (3), it must, we think, be taken as against the defendants that they did not really contest, or did not act as if they contested, the two elements of 'inducement' and 'prejudice,' if once the element of 'representation' was established, any more than they contested the fact of actual knowledge with reference to waiver. It must be taken, consequently, that they cannot be permitted to raise them now."

But that does not get rid of the difficulty. It has been well established by a long line of authority that in order to support a plea of estoppel by representation, the representation must be a representation of an existing fact, a promise or a representation of an intention to do something in the future is entirely insufficient, and this, though Lord Bowen said in *Edgington* v. *Fitzmaurice* (4) that the state of a man's mind was as much a fact as the state of his digestion. In their Lordships' view it is impossible to say with any confidence whether the representation found by the jury to have been made—namely, that the defendants did not intend to rely upon the claims having been put in late—is a representation of an existing fact, a present existing resolve, or a promise or representation of an intention to do something in the future. Under those circumstances their Lordships think it is more desirable to dispose of the appeal on the ground of estoppel by conduct in going into possession, if that course be under the circumstances permissible, which they think it is.

It is quite true that the question of the proper construction of condition 12 was not distinctly and clearly raised either at the trial or in the High Court on the hearing of the appeal. It can scarcely be said, however, that it was not indirectly referred to. In para. 16 of the defendants' defence delivered on February 1, 1919, it is averred that, with the three exceptions named, the plaintiff never delivered to the

(1) (1894) 6 R. 67, 75, 80.
(2) [1897] A. C. 68, 76.
(3) [1900] A. C. 135, 145.
(4) 29 Ch. D. 459, 483.

J. C.
1922
YORKSHIRE INSURANCE CO. v. CRAINE.

defendants claims under the respective policies for loss or damage. In para. 3 of the reply of the plaintiff to this defence it is averred that as to this para. 16 if the accounts and other declarations were not delivered as alleged the defendants are estopped from saying that they were not delivered. Particulars of this reply were delivered averring that each of the defendants entered into and took possession of the plaintiff's premises on or about September 30, 1917, and retained that possession, excluding the plaintiff until on or about February 4, 1918.

The question of the construction of condition 12 is necessarily involved in the question of estoppel by going into possession, raised in the amended particulars.

The appellants in the eighth, ninth, tenth and twelfth paragraphs of their reasons given for their appeal, deal with this question of possession, and the respondent in the second of his reasons sets out that the appellants " took and retained possession of the premises and salvage until February 4, 1918, to the detriment of the respondent, and should, therefore, not now be admitted to aver that no valid claim was made and pending." Whether, however, this be so or not, their Lordships think, on the authority of Lord Watson's judgment delivered in the Privy Council in the case of *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), the construction of condition 12 should be ruled upon. He said: " When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

In the present case condition 12 is a written document, and the fact that the company entered into possession is proved beyond controversy. It will be observed that this statement of Lord Watson is not rested upon any statutory enactment resembling the fourth section of the Appellate Jurisdiction Act, 1876, but upon the general principle upon which a tribunal of last resort exercises in the public interest

(1) [1892] A. C. 473, 480.

J. C.
1922
YORKSHIRE INSURANCE CO. v. CRAINE.

the jurisdiction conferred upon it. Every word of Lord Watson's judgment is in their Lordships' view applicable to this case, and they think that on this question of estoppel by conduct—namely, the taking of the possession of the plaintiff's premises—the appeal on the proper construction of condition 12 fails, and they will humbly advise His Majesty accordingly.

Having regard to the appellants' undertaking given when special leave to appeal was granted, they must pay the respondent's costs of the appeal as between solicitor and client.

Solicitors for appellants: *Gray & Dodsworth.*
Solicitors for respondents: *Brundrett, Whitmore, & Randall.*

[PRIVY COUNCIL.]

J. C.*
1922
Aug. 3.

CITY OF MONTREAL . . . . . APPELLANTS;

AND

WATT AND SCOTT, LIMITED . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Municipal Sewer—Liability for Overflow—Exceptional Rainstorm—Contributory Negligence—Apportionment of Damages—Construction of Civil Code—Civil Code of Quebec, arts. 1054, 2615.

A municipal sewer is a thing under the control of the municipality. Consequently, a municipality in the Province of Quebec is liable under art. 1054 of the Civil Code for damage caused by an overflow of its sewer, if it fails to establish that it was unable (that is, unable by reasonable means) to prevent the overflow. The duty of the municipality is to construct its sewers so as to be capable of resisting all the violence of weather which may be expected, though perhaps rarely, to occur. It is therefore not exculpated under art. 1054 by the fact that the overflow was caused by an exceptional storm, not amounting to a cas fortuit or force majeure.

Where the damage is partly due to the plaintiff's own negligence,

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* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD PARMOOR, and LORD PHILLIMORE.

J. C.
1922
CITY OF MONTREAL v. WATT AND SCOTT, LD.

the Court, according to the jurisprudence of Lower Canada, can reduce proportionately the damages payable by the defendant municipality.

Art. 2615 of the Civil Code, which provides that when a difference exists between the English and French texts of any article that version shall prevail which is most consistent with the existing law, applies only where there is a difference between the plain meaning of the two texts; where one text is capable of different meanings, the other text may be referred to in order to ascertain which meaning was intended.

Quebec Ry. Light, Heat and Power Co. v. *Vandry* [1920] A. C. 662 discussed and followed.

Great Western Ry. Co. of Canada v. *Braid* (1863) 1 Moo. P. C. (N. S.) 101 followed.

Judgment of the Supreme Court affirmed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (May 4, 1920) reversing a judgment of the Court of King's Bench, Appeal Side, for the Province of Quebec, and restoring the judgment of the Superior Court, subject to a reduction in the damages.

The respondents sued the appellant city in the Superior Court of Quebec to recover damages to their premises in Montreal, and to goods there stored, by an overflow of water from the appellants' sewer. They alleged that the overflow was due to the insufficiency of the sewer; they also alleged negligence and want of care in connection with it. The appellants by their defence alleged that the sewer was properly constructed and kept in good condition; that it was sufficient for all ordinary needs; and that the rainfall causing the overflow was of a kind so extraordinary as to constitute force majeure. They further pleaded that the respondents' drain was defective, and that it should have had a valve or trap to prevent water from backing up from the sewer.

The facts appear from the judgment of the Judicial Committee.

The action was tried by Weir J., sitting with a jury, and resulted in a judgment for the plaintiffs for $3000. Upon an appeal to the Court of King's Bench, Appeal Side, the judgment was set aside, the learned judges holding that the rainstorm amounted to a cas fortuit or force majeure for which the city could not be held liable. Upon a further appeal to

the Supreme Court of Canada that Court (Idington, Duff, Anglin, Mignault JJ.; Brodeur J. dissenting) reversed the judgment appealed from, but reduced the damages to half the amount awarded by Weir J., on the ground that the damage was in fact caused by the fault of the respondents in not having a valve at the mouth of their drain. The appeals to the Appeal Side and to the Supreme Court are reported respectively at Q. R. 29 K. B. 338 and 60 Can. S. C. R. 523.

1922. June 22, 23; July 3. *Atwater K.C.*, *St. Pierre K.C.* and *Hon. Geoffrey Lawrence* for the appellants. There was no faute or negligence on the part of the appellants, and they are not liable. The judgment appealed from unduly extends the responsibility of municipal corporations. Their duty does not extend beyond providing a drainage system which is properly constructed, and is sufficient for all ordinary requirements; they are not answerable if a system, so constructed, fails to carry off flood water caused by exceptional and unusual rainstorms: *Blyth* v. *Birmingham Waterworks Co.* (1); *Hammond* v. *St. Pancras Vestry* (2); *Stretton's Derby Brewery Co.* v. *Derby Corporation* (3); *Madras Ry. Co.* v. *Zemindar of Carvatenagarum* (4); *A. M. C. Medicine Co.* v. *City of Montreal.* (5) The evidence shows that the rainfall was of a wholly exceptional character. The damage was not caused by a thing under the control of the appellants within the meaning of art. 1054 of the Civil Code. If any "thing" caused the damage it was the respondents' drain. *Rylands* v. *Fletcher* (6) does not apply, since the sewer was constructed and used under statutory authority. [Reference was also made to *Quebec Ry. Light, Heat and Power Co.* v. *Vandry.* (7)]

Horace Douglas for the respondents. Whether the case is regarded as an ordinary case of negligence, or as one in which there was a rebuttable presumption under art. 1054, the appellants were liable. Under their charter (62 Vict. c. 58, ss. 299, 300, 361 to 364) they had complete control of the

(1) (1856) 11 Ex. 781.
(2) (1874) L. R. 9 C. P. 316.
(3) [1894] 1 Ch. 431.
(4) (1874) L. R. 1 Ind. App. 364.
(5) (1899) Q. R. 15 S. C. 594.
(6) (1868) L. R. 3 H. L. 330.
(7) [1920] A. C. 662.

J. C. 1922 CITY OF MONTREAL v. WATT AND SCOTT, LD.

sewer. The appellants were under a duty to exercise reasonable care in its construction, which includes making it adequate to carry off any rainfall which might be foreseen; upon the evidence the rainfall causing the overflow was of that character. The authorities chiefly relied upon by the appellants as to the duty of a municipality were decided upon the special words of English statutes, not upon Quebec law. That the appellants' duty was that which is contended for see *Great Western Ry. Co. of Canada* v. *Braid* (1); *Mayor of Hawthorn* v. *Kannuluik* (2); *Sawyer* v. *Ives*. (3) Further, the trial judge rightly found that the appellants should have installed a valve to prevent water passing from the sewer into the drain. If the case is regarded as coming under art. 1054, which article was discussed in *Vandry's Case* (4), the appellants fail, because, for the reasons already stated, they did not establish that they could not prevent the damage. [Reference was also made to *Faulkner* v. *City of Ottawa*. (5)]

Atwater K.C. replied.

Aug. 3. The judgment of their Lordships was delivered by

LORD DUNEDIN. The City of Montreal by its charter was empowered to construct and did construct a sewerage system. One of its sewers ran along Commissioners Street, on which the premises of the respondents are situated. These premises have a cellar, from the floor of which a drain is laid connecting with the sewer in the said street. Before its junction with this sewer there is laid into it another drain which serves to carry away the water from the roof of the respondents' premises, the water therefrom being collected in the ordinary way by runnels or gutters, which have perpendicular pipes laid into the drain. These connections were made with the sanction and approval of the city authorities.

On the night of July 29 and the early morning of July 30, 1917, a very heavy rainstorm occurred in the city; in consequence thereof the sewer in Commissioners Street became full and was unable to carry away all the rainwater brought

(1) 1 Moo. P. C. (N. S.) 101.
(2) (1905) 22 Times L. R. 28 (P. C.).
(3) (1895) Q. R. 4 Q. B. 374.
(4) [1920] A. C. 662.
(5) (1909) 41 Can. S. C. R. 190.

to it from various sources. The result was that the respondents' cellar was flooded to a depth of about two feet and some goods stored therein were damaged.

The present action was raised by the respondents against the appellants, the City of Montreal, to recover the value of the damage so suffered. The action was tried by Weir J. without a jury. It was tried simultaneously with another action raised in respect of the flooding of the same cellar in March, 1917. That action is, however, not the subject of this appeal. The learned judge found in fact that the sewer had become full during the storm and that in consequence the water in the sewer had regurgitated and flooded the cellar. He then in law found the city liable and rested the liability on three grounds: (1.) He held that the sewer as constructed was insufficient to cope with such rainstorms as might well be expected. (2.) He held that the city, having power to place automatic valves at the junction of the premises drained with the sewer, which valves would have prevented the regurgitation from the sewer, had failed to do so. (3.) He found that they had failed to put in operation a pumping station which would have relieved the pressure in the sewer.

On appeal to the King's Bench (Appeal Side) that Court, while affirming the conclusion in fact that the flooding was caused by regurgitation from the sewer, held that the storm in question was so exceptional as to amount to a cas fortuit or force majeure, and that that circumstance destroyed all the grounds of liability above specified.

Neither the trial judge nor the judges of the King's Bench made any allusion to art. 1054 of the Code. It is right, however, to point out that both judgments were pronounced before the case of the *Quebec Ry. Light, Heat and Power Co.* v. *Vandry* (1) had been decided by this Board. Appeal was then taken to the Supreme Court of Canada. That Court, by a majority of four to one, held that the rainfall was not so exceptional as to constitute a cas fortuit or force majeure. Inasmuch, however, as they considered that the plaintiffs

(1) [1920] A. C. 662.

J. C.
1922
CITY OF MONTREAL v. WATT AND SCOTT, LD.

might themselves have avoided some of the damage by installing a block valve at the entrance to the cellars, they halved the damage found due by the trial judge. From that judgment appeal has been taken by the city to the King in Council.

Mignault J., with whom Anglin J. agreed, expressed the view that the liability of the city depended upon art. 1054 of the Code, inasmuch as the damage, in his view, was caused by a thing, to wit, the sewer, which was under the control of the appellants. In so holding their Lordships think that he was clearly right. The fact that liability depends upon the words of the Code renders quite inappropriate many of the cases which were cited to their Lordships decided under other systems of law, such as, e.g., *Blyth* v. *Birmingham Waterworks Co.* (1) In systems not regulated by the Code or by legislation or decision equivalent to the Code, there can be no liability without proof of fault or negligence ; mere ownership or control cannot be enough to infer liability. Fault or negligence consists in the breach of a duty and what that duty is will vary according to circumstances. Reference may be made to what was said in the judgment of the Board in the case of the *Dominion Natural Gas Co.* v. *Collins.* (2)

The learned judge then cited the judgment of the Board in *Vandry's Case* and particularly that passage in which it was said that the first paragraph of art. 1054 " does not, in the case of damage caused by things which a person has under his care raise a mere presumption of faute, which the defendant may rebut by proving affirmatively that he was guilty of no faute. It establishes a liability, unless in cases where the exculpatory paragraph applies the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage." (3)

He goes on to state a view which their Lordships think is clearly erroneous as regards the considerations which moved

(1) 11 Ex. 781. (2) [1909] A. C. 640.
(3) [1920] A. C. 662, 676, 677.

the Board to give the opinion they did in the said case and which, in order to prevent misapprehension in subsequent cases, their Lordships think it their duty to correct. The learned judge says as follows: "Their Lordships also held that the 'exculpatory paragraph,' the penultimate paragraph of art. 1054 C.C. (viz., 'the responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage'), applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, schoolmasters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of art. 1054 C.C. without apparently considering the rule of construction laid down by art. 2615 C.C. that when a difference exists between the English and French texts of any article of the code 'that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded.' Hitherto it has always been considered that the 'exculpatory paragraph' of art. 1054 referred merely to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (*see* Pothier, 'Obligations,' Bugnet ed, No. 121)."

It must be noticed, as will be clearly seen by a perusal of the judgment in *Vandry's Case* (1), that there had been a sharply marked divergence of opinion among the judges in Canada as to the interpretation of art. 1054 and that that divergence of opinion had been clearly expressed in the conflicting opinions delivered in *Shawinigan Carbide Co.* v. *Doucet.* (2) Their Lordships had, in *Vandry's Case* (1), to decide in favour of one view or the other and they did not disguise from themselves either that the question was one of nicety, as indeed was shown by the division of opinion above mentioned, or that when one view had been taken criticism might yet remain based on various expressions in the article concerned. Now in this divergence of opinion it

(1) [1920] A. C. 662.

(2) (1909) 42 Can. S. C. R. 281.

J. C.
1922
CITY OF MONTREAL
v.
WATT AND SCOTT, LD.

was not permissible to treat the scope and ambit of the exculpatory paragraph as a question separate in itself. Yet to do so is what Mignault J. infers when he says: "Their Lordships *also* held, etc." That the exculpatory paragraph should apply to things is indeed a necessary corollary to what had already been said when the liability imposed is described as a liability defeasible by proof of inability to prevent the damage. Furthermore, their Lordships consider that the learned judge was completely in error when he supposed that the result arrived at was reached by preferring the French version to the English without adverting to the rule of construction laid down by art. 2615. In the first place, as already stated, the paragraph had to be considered not in the isolation of its own expression but as part of the whole scheme of the section. But further this was not a case where art. 2615 could come in. What is the meaning of the expression "difference between the French and English texts"? Obviously not that one is in French and the other in English, because then there would be a difference in every article. It must mean, therefore, that the plain meaning of the French words is one thing and that of the English another. But when the words in either language are capable of two meanings, it is perfectly legitimate to look at the other language to throw a light on the construction of the first. Now the English word "cases" does not necessarily mean "special cases," so as to be applicable only to the four paragraphs dealing with specified cases, but it is also quite apt to include all the instances general and special which the article so far contains. It is therefore quite legitimate to turn to the French and to say that "ci-dessus" seems to indicate that it had applied to all that had preceded it in the article. Their Lordships, therefore, think it better to repeat emphatically that the exculpatory paragraph applies to the first paragraph as well as to the second, third, fourth and fifth, and that that is a necessary part of the interpretation given to the article in *Vandry's Case*. (1) It is indeed obvious that if this was not so then the first paragraph would, as

(1) [1920] A. C. 662.

regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in *Vandry's Case*, which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" means unable by reasonable means. It does not denote an absolute inability. If, therefore, the storm in question could be described as a cas fortuit or force majeure, and if the appellants had shown that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.

This brings them to a consideration of the facts, and here they agree with the learned trial judge and with the majority of the Supreme Court. They think that the duty of the defendants was to construct sewers which were sufficient to cope with the amount of water which might be expected from time to time in the course of years. As was pointed out in the case of *Great Western Ry. Co. of Canada* v. *Braid* (1) by Lord Chelmsford, "the works must be constructed in such a manner as to be capable of resisting all the violence of weather which, in the climate of Canada," by which he obviously means that part of Canada, "might be expected, though perhaps rarely, to occur," and the same view was taken by nearly all the learned Lords in *Greenock Corporation* v. *Caledonian Ry. Co.* (2) Judged by this standard, it is evident that at least on two occasions before, and one after, the storm in question there was a rainfall of at least as great intensity. So far, therefore, the appellants have not made good the exculpatory paragraph. There might have been another way of avoiding the damage—namely, by the insertion of stop valves at the junction of the sewer to the drain. This the appellants did not do, so here again they fail.

Their Lordships agree with the majority of the Court in considering that the damage was done by the sewer which was obviously under the control of the appellants. It was

(1) 1 Moo. P. C. (N. S.) 101, 121. (2) [1917] A. C. 556.

J. C. 1922 CITY OF MONTREAL v. WATT AND SCOTT, LD.

indeed argued that the water which did the actual flooding was water from the respondents' own roof and not water regurgitated from the sewer. It is practically impossible to say how much of the water in the cellar was water of the one class or the other, but as Mignault J. says, it matters little, for if the sewer had been running free the water from the roof would have got away and could not have regurgitated along the connection drain.

It only remains to be considered, although the point was scarcely argued before their Lordships, whether the Supreme Court was right in apportioning the damage caused by the failure of the respondents to adopt the precaution of putting a resisting valve on the entrance drain to the building. Their Lordships think that they were. As was admitted in *Canadian Pacific Ry. Co.* v. *Fréchette* (1), the law of Lower Canada, unlike the law of England, enjoins apportionment of the damage where there has been a negligence of the plaintiff contributing to the accident. Their Lordships agree that the doctrine is applicable to modify a liability established by art. 1054 of the Code.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

(1) [1915] A. C. 871.

END OF VOL. II. AND OF APPELLATE SERIES FOR 1922.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922, will be as follows:—

In the First Series,
[1922] 1 Ch. [1922] 2 Ch.

In the Second Series,
[1922] 1 K. B. [1922] 2 K. B. [1922] P

In the Third Series,
[1922] 1 A. C. [1922] 2 A. C.

INDEX.

ACKNOWLEDGMENT—Sufficiency - 507
See LIMITATIONS, STATUTES OF.

ACT OF STATE — Requisition — Lessee's covenants—Impossibility of performance - - - - - 180
See LANDLORD AND TENANT.

AGENCY—Scope of authority - - 299
See MASTER AND SERVANT.

ALIEN ENEMY—*War—Declaration of—Company—Foreign Assets—Enemy Shareholders—Dividend—Conditions of Payment—Vesting Order—Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 2, *sub-s.* 1; *s.* 4, *sub-s.* 1.
Decision of the Court of Appeal [1921] 1 Ch. 675 affirmed. ARAMAYO FRANCKE MINES, LD. *v.* PUBLIC TRUSTEE
H. L. (E.) 406

APPELLATE JURISDICTION—Certiorari
See CANADA. 128

ARBITRATION CLAUSE—Charterparty 250
See SHIPPING.

AUSTRALIA - - - - - - 541
See INSURANCE (FIRE).

BAD DEBTS—Deduction for—Income tax
See JAMAICA. 169

BILL OF LADING—Sufficiency—C.i.f. contract - - - - - - 36
See SALE OF GOODS.

BUSINESS PROFITS—Tax—Exemption 176
See NEWFOUNDLAND.

CANADA—*Certiorari—Summary Conviction—Procedure on Certiorari—Inquiry into Evidence—Provincial Legislative Power—Contemporaneous Acts—Liquor Act (Alberta)—*

CANADA—*continued.*

Liquor Export Act (Alberta) — Popular Initiative — Direct Representation Act (Alberta)—"Penalty"—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92—*Supreme Court of Canada—Appellate Jurisdiction—Supreme Court Act* (*R. S. Can.*, 1906, *c.* 139), *s.* 36, *as amended by* 10 *&* 11 *Geo.* 5 (*Dom.*), *c.* 32.
Judgment of the Supreme Court of Canada affirmed. REX *v.* NAT BELL LIQUORS, LD.
J. C. 128

2. —— *Expropriation of Land — Compensation — Injurious Affection of Owner's other Lands — Lands held together—Shunting Yard — Basis of Compensation — Anticipated Legal Use — Exchequer Court* (*R. S. Can.*, 1906, *c.* 140), *s.* 20—*Expropriation Act* (*R. S. Can.*, 1906, *c.* 143), *ss.* 22, 26, 27.
SISTERS OF CHARITY OF ROCKINGHAM *v.* THE KING - - - - - J. C. 315

3. —— (QUEBEC)— *Municipal Sewer — Liability for Overflow—Exceptional Rainstorm—Contributory Negligence—Apportionment of Damages—Construction of Civil Code—Civil Code of Quebec, arts.* 1054, 2615.
Judgment of the Supreme Court affirmed. CITY OF MONTREAL *v.* WATT AND SCOTT, LD.
J. C. 555

CARRIER— *Goods — Railway Company — Owner's Risk Contract — Departure from agreed Transit — "Misconveyance" — Liability of Railway Company.*
Decision of the Court of Appeal [1922] 1 K. B. 192 affirmed. LONDON AND NORTH WESTERN RY. CO. *v.* NEILSON - H. L. (E.) 263

CASES:—
—— *Aramayo Francke Mines, Ld., In re* [1921] 1 Ch. 275.
Affirmed - - - - - 406

CASES—*continued.*

—— *Argentino, The* (1889) 14 App. Cas. 519; 13 P. D. 191.
Applied. ADMIRALTY COMMISSIONERS *v.* S.S. VALERIA **H. L. (E.) 242**

—— *Ashley* v. *General Union of Operative Carpenters and Joiners* [1921] 2 Ch. 399.
Affirmed - - - - - **440**

—— *Att.-Gen.* v. *Lancashire and Yorkshire Ry. Co.* (1864) 2 H. & C. 792.
Discussed. GREAT WESTERN RY. CO. *v.* BATER - - **H. L. (E.) 1**

—— *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180.
Distinguished. MATTHEY *v.* CURLING - - - **H. L. (E.) 180**

—— *Braithwaite* v. *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* [1921] 2 Ch. 399.
Affirmed - - - - - **440**

—— *Chesham's (Lord) Settlement, In re* [1909] 2 Ch. 329.
Considered and distinguished. PORTMAN *v.* VISCOUNT PORTMAN **H. L. (E.) 473**

—— *Christie* v. *Gosling* (1866) L. R. 1 H. L. 279.
Applied. PORTMAN *v.* VISCOUNT PORTMAN - - **H. L. (E.) 473**

—— *Colonial Bank of Australasia* v. *Willan* (1874) L. R. 5 P. C. 417.
Approved and followed. REX *v.* NAT BELL LIQUORS, LD. - **J. C. 128**

—— *Cooper* v. *Kendall* - [1909] 1 K. B. 405
Approved. SPENCER *v.* HEMMERDE **H. L. (E.) 507**

—— *Cowper Essex* v. *Acton Local Board* (1889) 14 App. Cas. 153.
Followed. SISTERS OF CHARITY OF ROCKINGHAM *v.* THE KING - **J. C. 315**

—— *Cox, McEuen & Co.* v. *Malcolm & Co.* [1912] 2 K. B. 107n.
Distinguished. HANSSON *v.* HAMEL AND HORLEY, LD. - **H. L. (E.) 36**

—— *Dawsons, Ld.* v. *Bonnin* - 1921 S. C. 511
Affirmed with a variation - **413**

—— *Fettes* v. *Robertson* (1921) 37 T. L. R. 581.
Considered. SPENCER *v.* HEMMERDE **H. L. (E.) 507**

—— *Foley* v. *Burnell* (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319.
Applied. PORTMAN *v.* VISCOUNT PORTMAN - - **H. L. (E.) 473**

— *Foster* v. *Great Western Ry. Co.* [1904] 2 K. B. 306.
Overruled. LONDON AND NORTH WESTERN RY. CO. *v.* NEILSON **H. L. (E.) 263**

—— *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* [1896] 2 Q. B. 59.
Discussed. MANCHESTER LINERS, LD. *v.* RAE, LD. - **H. L. (E.) 74**

CASES—*continued.*

—— *Goff* v. *Great Northern Ry. Co.* (1861) 3 E. & E. 672.
Applied. PERCY *v.* GLASGOW CORPORATION - - **H. L. (Sc.) 299**

—— *Great Western Ry. Co.* v. *Bater.*
Affirmed - - - - - **1**

—— *Great Western Ry. Co. of Canada* v. *Braid* (1863) 1 Moo. P. C. (N. S.) 101.
Followed. CITY OF MONTREAL *v.* WATT AND SCOTT, LD. **J. C. 555**

—— *Greta Holme, The* - [1897] A. C. 596
Distinguished. ADMIRALTY COMMISSIONERS *v.* S.S. VALERIA **H. L. (E.) 242**

—— *Harding* v. *Metropolitan Ry. Co.* (1872) L. R. 7 Ch. 154.
Applied. MATTHEY *v.* CURLING **H. L. (E.) 180**

—— *Harrington* v. *Harrington* (1871) L. R. 5 H. L. (E.) 87.
Explained. PORTMAN *v.* VISCOUNT PORTMAN - - **H. L. (E.) 473**

—— *Landauer & Co.* v. *Craven & Speeding Brothers* [1912] 2 K. B. 94.
Explained and followed. HANSSON *v.* HAMEL AND HORLEY, LD. **H. L. (E.) 36**

—— *Lundie* v. *MacBrayne* (1894) 21 R. 1085
Applied. PERCY *v.* GLASGOW CORPORATION - - **H. L. (Sc.) 299**

—— *Mallet* v. *Great Eastern Ry. Co.* [1899] 1 Q. B. 309.
Applied. LONDON AND NORTH WESTERN RY. CO. *v.* NEILSON **H. L. (E.) 263**

—— *Marpessa, The* - - [1907] A. C. 241
Distinguished. ADMIRALTY COMMISSIONERS *v.* S.S. VALERIA **H. L. (E.) 242**

—— *Mediana, The* - - [1900] A. C. 113
Distinguished. ADMIRALTY COMMISSIONERS *v.* S.S. VALERIA **H. L. (E.) 242**

—— *Mills* v. *East London Union* (1872) L. R. 8 C. P. 79, 85.
Dictum of Grove J. in, disapproved. MATTHEY *v.* CURLING - **H. L. (E.) 180**

—— *Moore* v. *Metropolitan Ry. Co.* (1872) L. R. 8 Q. B. 36.
Applied. PERCY *v.* GLASGOW CORPORATION - - **H. L. (Sc.) 299**

—— *Neilson* v. *London and North Western Ry. Co.* [1922] 1 K. B. 192.
Affirmed - - - - - **263**

—— *Portman (Viscount)* v. *Portman* [1921] 2 Ch. 491.
Affirmed - - - - - **473**

—— *Quebec Ry. Light, Heat and Power Co.* v. *Vandry* [1920] A. C. 662.
Discussed and followed. CITY OF MONTREAL *v.* WATT AND SCOTT, LD. **J. C. 555**

CASES—*continued.*

—— *Reg.* v. *Bolton* (1841) 1 Q. B. 66.
Approved and followed. REX *v.* NAT BELL LIQUORS, LD. - **J. C. 128**

—— *Rex* v. *Carter* (1916) 9 Alb. L. R. 481.
Approved. REX *v.* NAT BELL LIQUORS, LD. - - **J. C. 128**

—— *Rex* v. *Emery* (1916) 10 Alb. L. R. 139.
Disapproved. REX *v.* NAT BELL LIQUORS, LD. - - **J. C. 128**

—— *Rex* v. *Hoffman* (1917) 28 Man. R. 7.
Disapproved. REX *v.* NAT BELL LIQUORS, LD. - - **J. C. 128**

—— *Rigby* v. *Connol* - (1880) 14 Ch. D. 482
Considered. AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS *v.* BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS *v.* ASHLEY **H. L. (E.) 440**

—— *Roberts* v. *Poplar Assessment Committee* [1922] 1 K. B. 25.
Reversed - - - - **93**

—— *Scarsdale* (*Lord*) v. *Curzon* (1860) 1 J. & H. 40.
Applied. PORTMAN *v.* VISCOUNT PORTMAN - - **H. L. (E.) 473**

—— *Smith* (*John*) *& Son* v. *Moore* [1921] 2 A. C. 13, 25.
Dictum of Viscount Finlay in, disapproved. WANKIE COLLIERY CO. *v.* INLAND REVENUE COMMISSIONERS - - **H. L. (E.) 25**

—— *Tennant* v. *Smith* [1892] A. C. 150, 159.
Dictum of Lord Watson in, not followed. GREAT WESTERN RY. CO. *v.* BATER - - **H. L. (E.) 1**

—— *Wankie Colliery Co.* v. *Inland Revenue Commissioners* [1921] 3 K. B. 344.
Affirmed - - - - **25**

—— *Whitehall Court* v. *Ettlinger* [1920] 1 K. B. 680.
Approved. MATTHEY *v.* CURLING **H. L. (E.) 180**

CERTIORARI—Procedure - - - **128**
See CANADA.

CHARTERPARTY - - - - **250**
See SHIPPING.

C.I.F. CONTRACT—Tender of documents—Bill of lading—Sufficiency - **36**
See SALE OF GOODS.

COLLISION—Measure of damages - **242**
See SHIPPING.

COLONIES.
See AUSTRALIA, CANADA, JAMAICA, NEWFOUNDLAND, and TRINIDAD.

COMPENSATION—Expropriation of land **315**
See CANADA.

CONTRACT—Breach—Implied warranty **74**
See SALE OF GOODS.

CONTRIBUTORY NEGLIGENCE—Overflow of sewer - - - - - **555**
See CANADA.

CORPORATION—Tramway owner—Statutory powers—Improper exercise **299**
See FALSE IMPRISONMENT.

DAMAGES—Measure of—Collision - **242**
See SHIPPING.

DIVIDENDS—Declaration of—Enemy shareholder - - - - - **406**
See ALIEN ENEMY.

EMPLOYMENT OF PROFIT—Railway clerk—Income tax—Liability of railway company to assessment - - **1**
See REVENUE.

ENEMY SHAREHOLDER - - - **406**
See ALIEN ENEMY.

ESTOPPEL - - - - - - **541**
See INSURANCE (FIRE).

EVICTION—Title paramount - - **180**
See LANDLORD AND TENANT.

EXCESS PROFITS DUTY—Trade or business—Change of ownership - - **25**
See REVENUE.

EXPROPRIATION—Land—Compensation **315**
See CANADA.

EXPULSION—Member of trade union—Injunction—Jurisdiction - **440**
See TRADE UNION.

FALSE IMPRISONMENT—*Master and Servant—Liability for Acts of Servant—Scope of Authority—Corporation as Tramway Owners—Statutory Powers—Improper Exercise—Giving Passenger into Custody—Action for Damages—Relevancy.*
Decision of the First Division of the Court of Session in Scotland reversed. PERCY *v.* GLASGOW CORPORATION - **H. L. (Sc.) 299**

FIRE INSURANCE.
See INSURANCE (FIRE).

GIFT—Land—Validity — Absence of registration - - - - - **330**
See TRINIDAD.

HEIRLOOMS—Rule against perpetuities **473**
See WILL.

HOUSE OF LORDS—Peeress—Claim to sit and vote - - - - - **339**
See PARLIAMENT.

IMPLIED WARRANTY—As to fitness of goods for required purpose - 74
See SALE OF GOODS.

IMPOSSIBILITY OF PERFORMANCE — Covenant—Requisition of leasehold premises by War Office - - 180
See LANDLORD AND TENANT.

INCOME TAX.
See JAMAICA and REVENUE.

INCREASE OF RENT, &c. (RESTRICTIONS), ACT, 1920 - - 93
See RATING.

INDEMNITY ACT, 1920 - - - 279
See SHIPPING.

INSURANCE (FIRE)—Covenant to insure and reinstate - - - - 180
See LANDLORD AND TENANT.

2. —— *Conditions of Policy — Breach of Condition — Estoppel of Insurer — Delivery of Particulars of Loss—Insurer taking Possession.*
Judgment of the High Court of Australia affirmed. YORKSHIRE INSURANCE CO., LD. *v.* CRAINE - - - - - J. C. 541

3. —— *Untrue Answer to Question in Proposal Form—Proposal made the Basis of the Contract—Warranty—Condition.*
Interlocutor of the Second Division of the Court of Session in Scotland 1921 S. C. 511 affirmed with a variation. DAWSONS, LD. *v.* BONNIN - - - - H. L. (Sc.) 413

JAMAICA — *Income Tax—Profits of Trade —Deduction for bad Debt—Debt incurred in earlier Year — Income Tax Law* (*No.* 24 *of* 1919, *Jamaica*), *s.* 10 (*d*).
Judgment of the Supreme Court affirmed. GLEANER CO., LD. *v.* ASSESSMENT COMMITTEE J. C. 169

JUDICIAL COMMITTEE—Appeals.
See CANADA, INSURANCE (FIRE), JAMAICA, NEWFOUNDLAND, and TRINIDAD.

JURISDICTION — Ouster of — Arbitration clause - - - - - - 250
See SHIPPING.

LAND — Expropriation — Compensation 315
See CANADA.

LANDLORD AND TENANT—*Covenants to repair, insure and reinstate—Breach—Impossibility of Performance—Requisition by War Office—Destruction of Premises by Fire —Eviction by Title Paramount—Prevention by Act of State.*
MATTHEY *v.* CURLING - H. L. (E.) 180

LEGISLATIVE POWER—Provincial - 128
See CANADA.

LIMITATIONS, STATUTES OF—*Debt—Acknowledgment—Sufficiency—Limitations Act,* 1623 (21 *Jac.* 1, *c.* 16)—*Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14).
Decision of the Court of Appeal reversed. SPENCER *v.* HEMMERDE - H. L. (E.) 507

MASTER AND SERVANT—Liability for act of servant—Scope of authority 299
See FALSE IMPRISONMENT.

MEASURE OF DAMAGES—Collision - 242
See SHIPPING.

"MISCONVEYANCE" - - - 263
See CARRIER.

MISREPRESENTATION—Materiality — Proposal for insurance - - 413
See INSURANCE (FIRE).

MUNICIPAL SEWER—Overflow - - 555
See CANADA.

NEWFOUNDLAND—*Tax on Profits—Profits from Export of Ore—Exemption from Taxation "upon or in respect of" Ore—Construction—Business Profits Tax Act,* 1917 (8 *Geo.* 5, *c.* 1, *Newfoundland*).
Judgment of the Supreme Court affirmed. NOVA SCOTIA STEEL AND COAL CO. *v.* MINISTER OF FINANCE AND CUSTOMS - J. C. 177

OWNER'S RISK CONTRACT - - 263
See CARRIER.

PARLIAMENT—*House of Lords—Peeress in own Right—Claim to Sit and Vote—Sex Disqualification (Removal) Act,* 1919 (9 *& 10 Geo.* 5, *c.* 71), *s.* 1.
VISCOUNTESS RHONDDA'S CLAIM H. L. (E.) 339

PARTICULARS OF LOSS — Delivery of— Waiver - - - - - - 541
See INSURANCE (FIRE).

PEERESS—Claim to sit and vote in House of Lords - - - - - 339
See PARLIAMENT.

PERPETUITY—Rule against—Heirloom 473
See WILL.

PETITION OF RIGHT—Discharge — Indemnity Act, 1920 - - - 279
See SHIPPING.

POLICY—Fire insurance—Condition—Breach —Estoppel - - - - - 541
See INSURANCE (FIRE).

—— —— Proposal made basis of contract— Untrue answer to question in Proposal - - - - - - 413
See INSURANCE (FIRE).

PRINCIPAL AND AGENT - - - 299
See MASTER AND SERVANT.

PRIVY COUNCIL—Appeals.
See JUDICIAL COMMITTEE.

PROFITS—Business—Tax—Exemption 177
See NEWFOUNDLAND.

—— Excess profits duty—Assessment - 25
See REVENUE.

—— Income tax—Deduction for bad debts
See JAMAICA. 169

PROFIT-SHARING SCHEME—Participation in, by employees—Trade union rules - - - - - 440
See TRADE UNION.

PROVINCIAL LEGISLATIVE POWER — Liquor legislation - - - 128
See CANADA.

PUBLIC OFFICE—Clerk in employment of railway company—Income tax—Assessment - - - - - 1
See REVENUE.

RAILWAY COMPANY—Income tax—Liability to assessment in respect of employees - - - - 1
See REVENUE.

—— —— Owner's risk contract - - 263
See CARRIER.

RATING — *Assessment — Beerhouse — Tied House—Premium on Assignment of Lease—Restriction on Rent—Standard Rent—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 4—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1.
Decision of the Court of Appeal [1922] 1 K. B. 25 reversed. POPLAR ASSESSMENT COMMITTEE *v.* ROBERTS - **H. L. (E.) 93**

REPAIRING COVENANTS — Breach — Impossibility - - - - 180
See LANDLORD AND TENANT.

REQUISITION—Land—War Office - 180
See LANDLORD AND TENANT.

—— Ship—Admiralty - - - 279
See SHIPPING.

RESTRICTION ON RENT - - - 93
See RATING.

REVENUE—*Excess Profits Duty—Trade or Business—Change of Ownership—Liability of Owner in respect of Profits made by Predecessor—Finance (No. 2) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38; *s.* 45, *sub-s.* 2.
Decision of the Court of Appeal [1921] 3 K. B. 344 affirmed. WANKIE COLLIERY CO. *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 25**

2. —— *Income Tax—"Public office or employment of profit"—Clerk in Employment of Railway Company—Liability of Railway Company to Assessment—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sch. E, r.* 3—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. E*—*Income Tax Act*, 1860 (23 & 24 *Vict. c.* 14), *s.* 6.
Decision of the Court of Appeal [1921] 2 K. B. 128 reversed. GREAT WESTERN RY. CO. *v.* BATER - - - **H. L. (E.) 1**

RIGHT TO SUE—Restriction of—Arbitration clause - - - - - 250
See SHIPPING.

RULE AGAINST PERPETUITIES—Heirlooms - - - - - 473
See WILL.

SALE OF GOODS—*C.i.f. Contract—Tender of Documents—Through Bill of Lading—Sufficiency.*
Decision of the Court of Appeal affirmed. HANSSON *v.* HAMEL AND HORLEY, LD. **H. L. (E.) 36**

2. —— *Contract—Implied Warranty—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 1.
Decision of the Court of Appeal reversed. MANCHESTER LINERS, LD. *v.* RAE, LD. **H. L. (E.) 74**

SEWER—Overflow - - - - 555
See CANADA.

SEX DISQUALIFICATION (REMOVAL) ACT, 1919 - - - - - 339
See PARLIAMENT.

SHIPPING — *Charterparty — Arbitration Clause—Term of Clause restricting the Right to sue—Ouster of the Jurisdiction of the Court — Action in Respect of Damage caused by Unseaworthiness — Implied Condition of Seaworthiness — Action whether barred by Arbitration Clause.*
Decision of the Court of Appeal affirmed on different grounds. ATLANTIC SHIPPING AND TRADING CO., LD. *v.* DREYFUS (LOUIS) & CO. - - - **H. L. (E.) 250**

2. —— *Collision — Chartered Vessel — Measure of Damages.*
Decision of the Court of Appeal affirmed. ADMIRALTY COMMISSIONERS *v.* S.S. VALERIA **H. L. (E.) 242**

3. —— *Requisition by Admiralty—Charterparty, Form B—Loss of Ship by Enemy Action—Compensation — Petition of Right—Legal Proceeding "discharged and made void"—Indemnity Act*, 1920 (10 & 11 *Geo.* 5, *c.* 48, *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*a*)).
Decision of the Court of Appeal reversed. ATT.-GEN. *v.* ROYAL MAIL STEAM PACKET CO. **H. L. (E.) 279**

STANDARD RENT - - - - 93
See RATING.

STATUTES:—
I. IMPERIAL.
1623.
21 Jac. 1, c. 16 (Limitations): SPENCER *v.* HEMMERDE - - **H. L. (E.) 507**

STATUTES—*continued.*

1828.

9 Geo. 4, c. 14: SPENCER *v.* HEMMERDE **H. L. (E.) 507**

1842.

5 & 6 Vict. c. 35 (Income Tax), s. 146, Sch. E: GREAT WESTERN RY. CO. *v.* BATER - - **H. L. (E.) 1**

1853.

16 & 17 Vict. c. 34 (Income Tax), s. 2. Sch. E: GREAT WESTERN RY. CO. *v.* BATER - - **H. L. (E.) 1**

1860.

23 & 24 Vict. c. 14 (Income Tax), s. 6: GREAT WESTERN RY. CO. *v.* BATER **H. L. (E.) 1**

1867.

30 & 31 Vict. c. 3 (British North America), s. 92: REX *v.* NAT BELL LIQUORS, LD. - - - - **J. C. 128**

1869.

32 & 33 Vict. c. 67 (Valuation (Metropolis) Act), s. 4: POPLAR ASSESSMENT COMMITTEE *v.* ROBERTS - **H. L. (E.) 93**

1871.

34 & 35 Vict. c. 31 (Trade Unions), s. 4: AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS *v.* BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS *v.* ASHLEY **H. L. (E.) 440**

1893.

56 & 57 Vict. c. 71 (Sale of Goods), s. 14, sub-s. 1: MANCHESTER LINERS, LD. *v.* RAE, LD. - **H. L. (E.) 74**

1915.

5 & 6 Geo. 5, c. 89 (Finance (No. 2) Act), ss. 38, 45: WANKIE COLLIERY CO. *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 25**

1919.

9 & 10 Geo. 5, c. 71 (Sex Disqualification Removal), s. 1: RHONDDA'S (VISCOUNTESS) CLAIM - **H. L. (E.) 339**

1920.

10 & 11 Geo. 5, c. 17 (Increase of Rent, &c. (Restrictions) Act), s. 12, sub-s. 1: POPLAR ASSESSMENT COMMITTEE *v.* ROBERTS - - **H. L. (E.) 93**

10 & 11 Geo. 5, c. 48 (Indemnity), s. 1, sub-s. 1; s. 2, sub-s. 1 (*a*). ATT.-GEN. *v.* ROYAL MAIL STEAM PACKET CO. - - - **H. L. (E.) 279**

II. COLONIES.

CANADA.

Civil Code of Quebec, arts. 1054, 2615: CITY OF MONTREAL *v.* WATT AND SCOTT, LD. - - - **J. C. 555**

STATUTES—*continued.*

1906.

R. S. Can., 1906, c. 139 (Supreme Court), s. 36: REX *v.* NAT BELL LIQUORS, LD. - - - - **J. C. 128**

R. S. Can., 1906, c. 140 (Exchequer Court), s. 20. SISTERS OF CHARITY OF ROCKINGHAM *v.* THE KING - **J. C. 315**

R. S. Can., 1906, c. 143 (Expropriation), ss. 22, 26, 27. SISTERS OF CHARITY OF ROCKINGHAM *v.* THE KING **J. C. 315**

1916.

6 Geo. 5, c. 4 (Alb.) (Liquor Act), ss. 62, 63: REX *v.* NAT BELL LIQUORS, LD. **J. C. 128**

1918.

8 Geo. 5, c. 8 (Alb.) (Liquor Export): REX *v.* NAT BELL LIQUORS, LD. **J. C. 128**

1920.

10 & 11 Geo. 5 (Dom.), c. 32 (Supreme Court): REX *v.* NAT BELL LIQUORS, LD. - - - - **J. C. 128**

JAMAICA.

1919.

No. 24 of 1919, Jamaica (Income Tax), s. 10 (*d*): GLEANER CO., LD. *v.* ASSESSMENT COMMITTEE - **J. C. 169**

NEWFOUNDLAND.

1917.

8 Geo. 5, c. 1 (Business Profits Tax): NOVA SCOTIA STEEL AND IRON CO. *v.* MINISTER OF FINANCE AND CUSTOMS - - - **J. C. 169**

TRINIDAD.

No. 60 Consolidated Laws of Trinidad (Real Property Ordinance), s. 46. MACEDO *v.* STROUD - **J. C. 330**

STATUTES OF LIMITATIONS.
See LIMITATIONS, STATUTES OF.

TENDER OF DOCUMENTS—C.i.f. contract —Validity - - - - **36**
See SALE OF GOODS.

THROUGH BILL OF LADING—Sufficiency —C.i.f. contract - - - **36**
See SALE OF GOODS.

TRADE UNION—*Expulsion of Member—Action or Injunction—Participation in Employers' Profit-sharing Scheme—Rules of Union—Illegal Association—Directly enforcing Agreement between Members as to Employment—Jurisdiction of Court—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.
Decision of the Court of Appeal [1921] 2 Ch. 399 affirmed. AMALGAMATED SOCIETY OF CARPENTERS, CABINET MAKERS AND JOINERS *v.* BRAITHWAITE. GENERAL UNION OF OPERATIVE CARPENTERS AND JOINERS *v.* ASHLEY - - - - **H. L. (E.) 440**

TRINIDAD—*Gift of Land — Deed delivered to third Person— Absence of Registration of Instrument— Imperfect Gift— Invalidity in Equity—Real Property Ordinance (No. 60 Consolidated Laws of Trinidad), s. 46.*
Judgment of the Supreme Court varied. MACEDO *v.* STROUD - - - **J. C. 330**

WARRANTY—As to fitness of goods for required purpose - - - **74**
See SALE OF GOODS

—— Of truth of statements in proposal for insurance - - - - **413**
See INSURANCE (FIRE).

WILL—*Gift of Heirlooms—To go and be held with Mansion House—"So far as the rules of law and equity will permit"—"To be held and enjoyed accordingly"—Shifting Clause in Settlement of Mansion House—Tenant in Tail— Vesting at Birth—Rule against Perpetuities—Destination of Heirlooms.*
Decision of the Court of Appeal [1921] 2 Ch. 491 affirmed. PORTMAN *v.* VISCOUNT PORTMAN - - - - **H. L. (E.) 473**

WORDS—"Public Office or Employment of Profit": GREAT WESTERN RY. CO. *v.* BATER - - **H. L. (E.) 1**

—— "So far as the rules of law and equity will permit": PORTMAN *v.* VISCOUNT PORTMAN - **H. L. (E.) 473**

WRIT OF SUMMONS—To Parliament **339**
See PARLIAMENT.

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(p. 1 to p. 179).

PART IV.—AUGUST 2.

TABLE OF CASES.

APPEAL CASES.

	PAGE
GLEANER CO. *v.* ASSESSMENT COMMITTEE .. .. .. P. C.	169
GREAT WESTERN RY. CO. *v.* BATER H. L. (E.)	1
HANSSON *v.* HAMEL AND HORLEY, LD. .. .. .. H. L. (E.)	36
MANCHESTER LINES, LD. *v.* REA, LD. H. L. (E.)	74
NOVA SCOTIA STEEL AND COAL CO. *v.* MINISTER OF FINANCE AND CUSTOMS .. .. .. P. C.	176
POPLAR ASSESSMENT COMMITTEE *v.* ROBERTS .. .. H. L. (E.)	93
REX *v.* NAT BELL LIQUORS, LD. P. C.	128
WANKIE COLLIERY CO. *v.* INLAND REVENUE COMMISSIONERS H. L. (E.)	51

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

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[1922] 1 A. C. [1922] 2 A. C.

INDEX.

ACQUISITION OF LAND—Local authority
See LAND. 27

APPORTIONMENT OF BLAME—Collision
See SHIPPING. 68

BANKER—Receiving cheque for collection—"Holder" - - - - - 1
See GAMING.

BETTING BY CHEQUE - 1
See GAMING.

BRITISH NATIONALITY - - - 105
See CYPRUS.

CANADA (BRITISH COLUMBIA) — *Succession Duty—Property within and outside Province—"Net value"—Succession Duty Act* (*R. S. B. C.*, 1911, *c.* 217), *ss.* 2, 7.

The effect of the definition of "net value" in s. 2 of the Succession Duty Act of British Columbia (R. S. B. C., 1911, c. 217) is not that that expression wherever used in the Act means the value of all the property of the deceased wherever situate, less his debts and incumbrances, but that it means the particular property with reference to which the expression is used in the section to be construed, less the deductions mentioned.

Where, therefore, a person domiciled in the Province dies leaving property situate within and property situate outside the Province, the succession duty payable under s. 7 of the Act is to be computed with reference only to the property within the Province.

Judgment of the Supreme Court reversed. ROYAL TRUST CO. *v.* MINISTER OF FINANCE OF BRITISH COLUMBIA - - - **J. C. 87**

2. —— **(QUEBEC)**—*Gift—Shares in Company—Delivery of Movable Property—Declaration of Trust—"Convey"—Civil Code of Lower Canada, arts.* 776, 981 (*a*).

The provision in art. 776 of the Civil Code of Lower Canada that gifts of movable property accompanied by delivery may be made and accepted by private writings and verbal agreements, relates only to such movable property as is capable of passing by delivery. In art. 981 (*a*) of the Code, which provides that a person may "convey" property to trustees by gift for another, the word "convey" does not cover a transaction of the kind known in English law as a declaration of trust.

There is, therefore, under the law of Quebec, no valid gift of shares where the registered holder, intending to make a gift of them, signs a transfer indorsed on the certificate purporting for value received to transfer the shares to herself as trustee for the intended donee ; and the company issues to the intending donor a new certificate (afterwards handed to the intended donee) certifying that the registered holder is the intending donor in trust for the intended donee.

Judgment of the Court of King's Bench affirmed. O'MEARA *v.* BENNETT - **J. C. 80**

CASES :—

—— *Balwart Rao* v. *Puran Mal* (1883) I. L. R. 6 All. 1.
Approved. KHAW SIM TEK *v.* CHUAH HOOI GNOH NEOH **J. C. 120**

—— *Cooke* v. *Midland Great Western Ry. Co. of Ireland* [1909] A. C. 229
Applied. GLASGOW CORPORATION *v.* TAYLOR - - **H. L. (Sc.) 44**

—— *Dey* v. *Mayo* - [1920] 2 K. B. 346
Followed. SUTTERS *v.* BRIGGS **H. L. (E.) 1**

—— *Karamea, The* - - 1921 P. 76
Affirmed - - - **H. L. (E.) 68**

—— *Nicholls* v. *Evans* - [1914] 1 K. B. 118
Overruled. SUTTERS *v.* BRIGGS **H. L. (E.) 1**

CASES—*continued.*
—— *Rannveig, The* - - [1920] P. 177
Affirmed - - - **J. C. 97**
—— *Salter* v. *Cavanagh* (1838) 1 Dr. & Wal. 668.
Distinguished. KHAW SIM JEK *v.* CHUAH HOOI GNOH NEOH **J. C. 120**

CHEQUE GIVEN FOR RACING BET - **1**
See GAMING.

CHILD—Death from eating poisonous berries —Public park—Liability of custodians - - - - - **44**
See NEGLIGENCE.

COLLISION.
See SHIPPING.

COLONIES.
See CANADA, CYPRUS, and STRAITS SETTLEMENTS.

COMPENSATION—Assessment — Acquisition of land by local authority **27**
See LAND.

CONDEMNATION—Neutral ship - - **97**
See PRIZE COURT.

CONTRABAND—Carriage of - - **97**
See PRIZE COURT.

CROSSING RULES—Collision - - **68**
See SHIPPING.

CYPRUS—*British Nationality — Orders in Council—Order interpreting earlier Proclamation — "Resident"—"Ordinarily resident."*

By an Order in Council made on November 5, 1914, Cyprus was annexed, and by a Proclamation made thereunder on March 3, 1915 (revoking an earlier Proclamation), it was provided that "all Ottoman subjects, resident in Cyprus on November 5, 1914, have become British subjects." An amending Order in Council made on November 27, 1917, after reciting that doubts had arisen as to the effect of the Order and the proper interpretation of the Proclamation, ordered that the following persons (inter alios) should be deemed to have become British subjects by virtue thereof: "any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 5, 1914."

The respondent, an Ottoman subject by birth, carried on business in Cairo from 1893 to 1913. In December, 1913, he went to Cyprus, and after three or four months brought his family there. He rented a house in Cyprus monthly, and while there discontinued his business in Cairo. He was present in Cyprus on November 5, 1914, and remained there until October, 1915, when he returned to Cairo, his family following in December. He received a passport describing him as a British subject, and was so registered at the British Consulate at Cairo, but after annual renewals registration was refused in 1919. He sued for a declaration that he was entitled to registration:—

Held, that if there were any difference between "resident" and "ordinarily resident" the latter became the test by virtue of the interpretative Order of 1917; but that on the facts the respondent was both "resident" and "ordinarily resident" in Cyprus on November 5, 1917, whether or not Cyprus was then his domicil; and that, whatever may have been his motive for going there, he was a British subject by virtue of the Order in Council. GOUT *v.* CIMITIAN **J. C. 105**

DECLARATION OF TRUST—Shares in company—Gift - - - - **80**
See CANADA.

GAMING—*Cheque given for Racing Bet — Indorsement in Blank—Banker receiving for Collection — "Indorsee" or "holder" — Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

By s. 1 of the Gaming Act, 1835, notes, bills, and mortgages which were by certain Acts of Parliament declared to be void, including notes, bills, and mortgages given as security for money lost in bets on horse races, are to be deemed to be made, drawn, accepted, given, or executed for an illegal consideration.

By s. 2 "In case any person shall . . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited" Gaming Acts "declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record":—

Held, that the "holder" of a note or bill includes the original payee and includes a banker who receives the note or bill for collection.

The loser of a bet on a horse race drew a cheque for the amount of the bet in favour of the winner and crossed it "Not Negotiable a/c Payee Only." The winner indorsed the cheque in blank and handed it to his bankers for collection. The bankers presented the cheque and obtained payment for it. In an action by the loser against the winner under s. 2 of the Act of 1835 to recover the amount of the cheque as having been paid to a holder:—

Held, that the bankers were indorsees and holders of the cheque, and that the plaintiff was entitled to recover.

Nicholls v. *Evans* [1914] 1 K. B. 118 overruled.

Dey v. *Mayo* [1920] 2 K. B. 346 followed.

Decision of the Court of Appeal affirmed.
SUTTERS *v.* BRIGGS - - - **H. L. (E.) 1**